

16A Am. Jur. 2d Constitutional Law § 180

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

3. Effect and Operation of Law; Facial and As Applied Constitutional Challenges

§ 180. Determination of as applied challenge to constitutionality of legislation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  990 to 1005, 1030, 1031

A well-established principle is that the effect of the statute may be found in the manner in which it is administered:¹ not only the final purpose of a law must be considered in determining its justice but also the means of its administration and the ways it may be defeated for legislation to be practical and efficient must regard this special purpose as well as the ultimate one.²

In contrast to a facial challenge, which involves the constitutionality of the statute as written, an "as applied" challenge to the constitutionality of a statute is evaluated considering how it operates in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations.³ An "as applied challenge" to the constitutionality of a statute concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case.⁴ A plaintiff generally cannot prevail on an as applied challenge without showing that the law has in fact been, or is sufficiently likely to be, unconstitutionally applied to him.⁵ In testing the effect of a statute by the manner of its administration, the test is exactly opposite to that ordinarily employed—the Court looks to what was actually done in the particular instance and not what might have been done. Thus, where the validity of a tax assessment by state officers is properly challenged, and the matter comes before the United States Supreme Court, that Court must determine the effect of the thing actually done, and what might have been done under the local statute is not controlling.⁶ In such situations the possibility of abuse is not an objection to constitutionality,⁷ and a law cannot be held unconstitutional merely because it may be unfaithfully or improvidently administered.⁸

A statute that is constitutional on its face might be applied in a constitutional way and hence should not be condemned in advance but possibly might be condemned later because of the way in which it is administered in fact.⁹ Unlike a statute that is held unconstitutional on its face, which cannot be enforced in any future circumstances, a statute that is held unconstitutional as applied can be enforced in those future circumstances where it is not unconstitutional.¹⁰

Observation:

Although the presumption that a statute is constitutional applies in both facial and as applied challenges, in an as applied challenge there is no presumption that the statute has been applied in a constitutional manner.¹¹

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Footnotes

- 1 U.S. v. Spector, 343 U.S. 169, 72 S. Ct. 591, 96 L. Ed. 863 (1952); Sanitation Dist. No. 1 of Jefferson County v. Campbell, 249 S.W.2d 767 (Ky. 1952).
As to constitutional protection against discriminatory administration of laws, see §§ 931, 932.
- 2 St. John v. People of State of New York, 201 U.S. 633, 26 S. Ct. 554, 50 L. Ed. 896 (1906).
- 3 State v. Crank, 468 S.W.3d 15 (Tenn. 2015).
As to facial challenge to constitutionality of legislation, see § 179.
- 4 Eby v. State, 166 N.H. 321, 96 A.3d 942 (2014).
- 5 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).
- 6 First Nat. Bank of Gulfport, Miss., v. Adams, 258 U.S. 362, 42 S. Ct. 323, 66 L. Ed. 661 (1922).
- 7 New York Mobile Homes Ass'n v. Steckel, 9 N.Y.2d 533, 215 N.Y.S.2d 487, 175 N.E.2d 151, 86 A.L.R.2d 270 (1961).
- 8 Preston v. Clements, 313 Ky. 479, 232 S.W.2d 85 (1950); People v. Kirby, 440 Mich. 485, 487 N.W.2d 404 (1992); State v. Spears, 1953-NMSC-033, 57 N.M. 400, 259 P.2d 356, 39 A.L.R.2d 595 (1953); Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952).
- 9 Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir. 1991).
- 10 Gessler v. Colorado Common Cause, 2014 CO 44, 327 P.3d 232 (Colo. 2014).
- 11 Voters with Facts v. City of Eau Claire, 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131 (2018).

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

4. Assumption of Constitutionality from Acquiescence to Legislation

§ 181. Assumption of constitutionality of legislation from acquiescence

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  990 to 1005, 1030, 1031

The length of time a statute has stood without any attacks on constitutional grounds is a factor that sometimes influences a court in upholding its constitutionality.¹ There is a policy not to invalidate a statute which has been in force without substantial challenge for many years, unless its unconstitutionality is obvious.² Moreover, long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered as matters within legislative control.³ A like rule has been held applicable to long acquiescence in the constitutionality of statutes similar to the one under consideration.⁴

Similarly, where a law has been held constitutional by courts of other states before the enactment of a similar law in this state, that fact should be considered in determining whether the statute is so clear a violation of the provisions of the constitution as to require the courts to hold it unconstitutional.⁵ The courts may properly recognize the serious results that would follow from a decision that a law is unconstitutional, where during a long period of acquiescence in its validity rights have become vested in reliance upon it.⁶ There is authority to the effect that under the doctrine of stare decisis, when a decision of a court of last resort determining the constitutionality of a statutory provision has been acquiesced in by the legislature and the people for a considerable period of time, and rights and interests have become settled under that construction, and no apparent beneficial result will be obtained by overruling the decision, the Court will steadfastly decline to reopen the question of constitutionality.⁷

Observation:

This last approach is a relatively extreme position, and there are numerous holdings that are expressly or impliedly to the contrary. Thus, the willingness of the United States Supreme Court to overrule earlier decisions (including decisions on questions of basic constitutional importance) when the error becomes manifest is familiar to all lawyers.⁸

On the other hand, the fact that a statute has been construed and applied for a considerable period of time does not necessarily render it free from constitutional attack,⁹ and mere acquiescence over a period of many years will not render an unconstitutional statute valid.¹⁰

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Footnotes

- 1 Ludecke v. Watkins, 335 U.S. 160, 68 S. Ct. 1429, 92 L. Ed. 1881 (1948); Bute v. People of State of Ill., 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948); Indiana Dept. of Revenue Inheritance Tax Division v. Callaway's Estate, 232 Ind. 1, 110 N.E.2d 903 (1953); Dearborn Tp. v. Dail, 334 Mich. 673, 55 N.W.2d 201 (1952); State v. McGee, 361 Mo. 309, 234 S.W.2d 587 (1950); Myers v. Oklahoma Tax Commission, 1956 OK 291, 303 P.2d 443 (Okla. 1956).
As to acquiescence in construction of constitutional provisions as an extrinsic aid to the courts, see § 91.
State v. Buckner, 223 N.J. 1, 121 A.3d 290 (2015).
- 2 Maynard v. Hill, 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654 (1888); State v. Johnson, 170 Wis. 218, 175 N.W. 589, 7 A.L.R. 1617 (1919).
- 3 Veterans' Welfare Board v. Riley, 189 Cal. 159, 208 P. 678, 22 A.L.R. 1531 (1922); State ex rel. Weinberger v. Miller, 87 Ohio St. 12, 99 N.E. 1078 (1912).
- 4 Ex parte Lee, 177 Cal. 690, 171 P. 958 (1918).
- 5 Keetch v. Cordner, 90 Utah 423, 62 P.2d 273, 108 A.L.R. 52 (1936).
- 6 Walling v. Bown, 9 Idaho 740, 76 P. 318 (1904), aff'd, 204 U.S. 320, 27 S. Ct. 292, 51 L. Ed. 503 (1907).
- 7 See, for example, Brown v. Board of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A.L.R.2d 1180 (1954), supplemented, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio L. Abs. 584 (1955).
- 8 People v. Kelly, 347 Ill. 221, 179 N.E. 898, 80 A.L.R. 890 (1931).
- 9 Grasse v. Dealer's Transport Co., 412 Ill. 179, 106 N.E.2d 124 (1952); Wilson v. School Dist. of Philadelphia, 328 Pa. 225, 195 A. 90, 113 A.L.R. 1401 (1937).

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

4. Assumption of Constitutionality from Acquiescence to Legislation

§ 182. Assumption of constitutionality of legislation from acquiescence—Particular periods of time

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 990 to 1005, 1030, 1031

West's Key Number Digest, [Statutes](#) 1528

The presumption of validity that applies to legislation generally is fortified by acquiescence through a number of years.¹ A statute effective over long period of time, with its validity being unquestioned by bench or bar, although not conclusive, is highly persuasive of its validity.² The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process.³ A long and consistent history of state practice is significant in the determination of the validity of such practice under the Federal Constitution; if a thing has been practiced for 200 years by common consent it will need a strong case for the 14th Amendment to affect it.⁴ The facts that a statutory provision, attacked on constitutional grounds, was originally enacted during the initial year of the government and was reenacted several times without substantial change do not preclude the existence of a contrary fundamental constitutional right, but they are highly persuasive of its nonexistence.⁵

Nonetheless, long-continued usage and interpretation are entitled to no weight if the statutes are in conflict with the plain meaning of the Constitution.⁶

Footnotes

- 1 Life & Casualty Insurance Company of Tennessee v. Barefield, 291 U.S. 575, 54 S. Ct. 486, 78 L. Ed. 999 (1934); Life & Cas. Ins. Co. of Tenn. v. McCray, 291 U.S. 566, 54 S. Ct. 482, 78 L. Ed. 987 (1934); Board of Com'r's of Howard County v. Kokomo City Plan Commission, 263 Ind. 282, 330 N.E.2d 92 (1975); State v. McGee, 361 Mo. 309, 234 S.W.2d 587 (1950).
- 2 Poole v. State, 244 Ark. 1222, 428 S.W.2d 628 (1968).
- 3 Anderson Nat. Bank v. Luckett, 321 U.S. 233, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944). As to the general presumption of constitutionality of statutes, see §§ 165 to 170.
- 4 Frank v. State of Md., 359 U.S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959) (overruled in part on other grounds by, Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)); Matter of Carlson, 580 F.2d 1365 (10th Cir. 1978).
- 5 Brasier v. Jeary, 256 F.2d 474, 67 A.L.R.2d 1096 (8th Cir. 1958).
- 6 Hamann v. Heekin, 88 Ohio St. 207, 102 N.E. 730 (1913); Kucker v. Sunlight Oil & Gasoline Co., 230 Pa. 528, 79 A. 747 (1911); Southern Ry. Co. v. City of Richmond, 175 Va. 308, 8 S.E.2d 271, 127 A.L.R. 1368 (1940); Kingsley v. City of Merrill, 122 Wis. 185, 99 N.W. 1044 (1904).

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

5. Factors Irrelevant to Constitutionality

§ 183. Irrelevant factors in determination of constitutionality of legislation, generally; conformity with spirit of constitution and natural rights; preamble

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West's Key Number Digest

West's Key Number Digest, Constitutional Law  990 to 1005, 1030, 1031

A precept of constitutional adjudication in the modern era is that the constitutionality of a statute is to be determined by whether it violates the express meaning or readily implied meaning of specific constitutional provisions rather than by whether it violates certain values or concepts deemed by the Court to be incorporated generally in the constitution.¹

Observation:

Constitutional scholars note that the United States Supreme Court began to implement this more restrictive precept during the New Deal, and as a result found valid a number of New Deal statutes; before then, the Court had sometimes found statutes constitutional only if a majority of Justices personally agreed that the statutes were necessary to protect important social goals.² By the 1950s, the Court itself was able to state, "The day is gone when this Court uses the Due Process Clause of the 14th Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."³

This precept of reliance on specific constitutional provisions has many corollaries, necessitated by the many irrelevant factors that courts used, mostly in pre-New Deal days, to determine the constitutionality of statutes. One such corollary is that courts are not at liberty to declare an act void because it is opposed to the spirit supposed to pervade the constitution,⁴ is against the nature and spirit of the government,⁵ or is contrary to the general principles of liberty⁶ or genius of a free people.⁷

The courts are not guardians of the rights of the people, except as those rights are secured by some constitutional provision that comes within the judicial cognizance.⁸ Therefore, the spirit of the Federal Constitution, or the preamble to the federal⁹ or a state¹⁰ constitution, cannot be invoked, apart from the words of the constitution, to invalidate a state statute¹¹ or a state constitutional amendment.¹²

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Footnotes

- 1 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937).
- 2 Rotunda and Nowak, Treatise on Constitutional Law § 15.4(b) (4th ed.).
- 3 Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955).
- 4 Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905); State v. Johns, 92 Fla. 187, 109 So. 228 (1926); Schmitt v. F. W. Cook Brewing Co., 187 Ind. 623, 120 N.E. 19, 3 A.L.R. 270 (1918); Pathfinder Coach Division of Superior Coach Corp. v. Cottrell, 216 Miss. 358, 62 So. 2d 383 (1953); Board of Elections for Franklin County v. State ex rel. Schneider, 128 Ohio St. 273, 191 N.E. 115, 97 A.L.R. 1417 (1934).
- 5 Ward v. Leche, 189 La. 113, 179 So. 52 (1938); Gorham v. Robinson, 57 R.I. 1, 186 A. 832 (1936).
- 6 Schmitt v. F. W. Cook Brewing Co., 187 Ind. 623, 120 N.E. 19, 3 A.L.R. 270 (1918).
- 7 Humes v. Missouri Pac. Ry. Co., 82 Mo. 221, 1884 WL 394 (1884), aff'd, 115 U.S. 512, 6 S. Ct. 110, 29 L. Ed. 463 (1885); State v. Henley, 98 Tenn. 665, 41 S.W. 1104 (1897) (separate dissenting opinion).
- 8 Asbury Hospital v. Cass County, 72 N.D. 359, 7 N.W.2d 438 (1943).
- 9 Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905).
- 10 District Landowners Trust v. Adams County, 104 Colo. 146, 89 P.2d 251 (1939); In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session, 263 So. 2d 797 (Fla. 1972), opinion supplemented, 279 So. 2d 14 (Fla. 1973) and opinion supplemented, 281 So. 2d 484 (Fla. 1973).
- 11 Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905).
- 12 Hockett v. State Liquor Licensing Bd., 91 Ohio St. 176, 110 N.E. 485 (1915).

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

5. Factors Irrelevant to Constitutionality

§ 184. Conformity with public policy as irrelevant factor in determination of constitutionality of legislation

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West's Key Number Digest

West's Key Number Digest, Constitutional Law  990 to 1005, 1030, 1031

It is generally recognized that the public policy of a state is to be found in its constitution and statutes.¹ This conclusion reflects the principle that all questions of policy, including changes in policy,² are for the determination of the legislature³ and not for the courts.⁴ If Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them; the Supreme Court should not legislate for them.⁵

When reviewing for constitutional unreasonableness, the judiciary must give great deference to legislative action and should not substitute its own public policy judgments for that of the enacting body.⁶ In short, public policy is not a basis for declaring a statute unconstitutional.⁷

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Footnotes

¹ *Baker v. U.S.*, 27 F.2d 863 (C.C.A. 1st Cir. 1928); *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 335 Mo. 448, 73 S.W.2d 393 (1934); *State v. Gateway Mortuaries*, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512 (1930); *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055 (1930); *Rickey v. Slingerland*, 143 Misc. 583, 256 N.Y.S. 901 (Sup 1932); *Bohn v. Salt Lake City*, 79 Utah 121, 8 P.2d 591, 81 A.L.R. 215 (1932).

- 2 In re Burbank, 401 B.R. 67 (Bankr. D. R.I. 2009); Hutchison v. Ross, 262 N.Y. 381, 187 N.E. 65, 89 A.L.R. 1007 (1933).
- 3 State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940); Wilson v. Walters, 19 Cal. 2d 111, 119 P.2d 340 (1941); McAdams v. Barbieri, 143 Conn. 405, 123 A.2d 182 (1956); Metropolitan Sports Facilities Com'n v. County of Hennepin, 478 N.W.2d 487 (Minn. 1991); Nickel v. School Bd. of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1953); Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90, 82 A.L.R.2d 1208 (1959); Salzman v. Impellitteri, 305 N.Y. 414, 113 N.E.2d 543 (1953); Rush v. Brown, 1940 OK 194, 187 Okla. 97, 101 P.2d 262 (1940); Gooch v. Rogers, 193 Or. 158, 238 P.2d 274 (1951).
- 4 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949); Robinson v. U.S., 324 U.S. 282, 65 S. Ct. 666, 89 L. Ed. 944 (1945); Kopp v. Fair Pol. Practices Com., 11 Cal. 4th 607, 47 Cal. Rptr. 2d 108, 905 P.2d 1248 (1995); In re Disinterment of Body of Jarvis, 244 Iowa 1025, 58 N.W.2d 24 (1953); Doherty v. Calcasieu Parish School Bd., 634 So. 2d 1172, 90 Ed. Law Rep. 968 (La. 1994); Pathfinder Coach Division of Superior Coach Corp. v. Cottrell, 216 Miss. 358, 62 So. 2d 383 (1953); Madrid v. St. Joseph Hosp., 1996-NMSC-064, 122 N.M. 524, 928 P.2d 250 (1996); Jones v. Jones, 48 Wash. 2d 862, 296 P.2d 1010, 54 A.L.R.2d 1403 (1956); State ex rel. Lambert v. County Com'n of Boone County, 192 W. Va. 448, 452 S.E.2d 906 (1994).
- 5 Pacific Operators Offshore, LLP v. Valladolid, 565 U.S. 207, 132 S. Ct. 680, 181 L. Ed. 2d 675 (2012). Courts are not concerned with questions relating to legislative policy. *State v. Yocom*, 233 W. Va. 439, 759 S.E.2d 182 (2014).
- 6 City of Austin v. Quick, 930 S.W.2d 678 (Tex. App. Austin 1996), writ granted, (Sept. 4, 1997) and judgment aff'd, 7 S.W.3d 109 (Tex. 1998). As to deference to legislature as basis or rationale for general principle of constitutionality of legislation, see § 166.
- 7 Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936); Shoul v. Commonwealth, Department of Transportation, Bureau of Driver Licensing, 643 Pa. 302, 173 A.3d 669 (2017); Galesburg Const. Co. Inc. of Wyoming v. Board of Trustees of Memorial Hospital of Converse County, 641 P.2d 745 (Wyo. 1982). In reviewing the constitutionality of legislation, an appellate court will not question the wisdom, policy, or justness of legislation enacted by the legislature, and will presume that the legislation is constitutional. *State v. Franklin*, 2018-NMSC-015, 413 P.3d 861 (N.M. 2018).

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

5. Factors Irrelevant to Constitutionality

§ 185. Conformity with general values as irrelevant factor in determination of constitutionality of legislation

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West's Key Number Digest

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The constitutionality of a statute is to be judged by its conformity with the express or clearly implied meaning of specific constitutional provisions rather than by its conformity with general values espoused by the court, even though these values are desirable in the abstract.¹ The courts have implemented this principle by declining to invalidate statutes that they characterize as merely reflecting these general values or qualities rather than actually violating a specific constitutional provision, and in doing so they use many different terms for these general qualities. To begin, one such quality is harshness, along with its synonyms and antonyms; courts are not at liberty to declare statutes invalid although they may be harsh,² or create hardships³ or inconvenience;⁴ or may be oppressive⁵ or severe or drastic.⁶ Conversely, the duty of the courts to give effect to the Federal and State Constitutions by invalidating acts in conflict with the organic law is not affected by the fact that the invalid legislation may seem highly beneficial or by the fact that great harm or unrest may result from declaring it void.⁷ The fact that a given law or procedure is efficient, convenient, and useful in facilitating the functions of government, standing alone, will not save it if it is contrary to the Constitution.⁸

Another quality previously used to evaluate legislation was its general reasonableness. The question of the reasonableness of an act that is otherwise within constitutional bounds is for the legislature exclusively, and in ordinary cases the courts have no revisory power concerning it⁹ or any power to substitute their opinion for the judgment of the legislature.¹⁰ Mere unreasonableness, then, does not necessarily render a statute unconstitutional.¹¹ Still, while the presumption of validity of a

legislative action is a presumption of reasonableness,¹² the courts properly may inquire whether an Act of Congress is arbitrary or capricious, that is, whether it has a reasonable relation to a legitimate end.¹³ Social and economic legislation that does not employ suspect classifications or impinge on fundamental rights must be upheld against an equal protection attack when the legislative means are rationally related to a legitimate governmental purpose; such legislation carries with it a presumption of rationality that can be overcome only by a clear showing of arbitrariness and irrationality.¹⁴

Further, the justice or injustice of statutory provisions is for the legislature to decide and is not for the courts, and statutes cannot be declared invalid on the ground that they are unjust¹⁵ or because they are contrary to the principles of natural justice¹⁶ or based on conceptions of morality with which the courts may disagree.¹⁷

One of the most firmly established corollaries is that the wisdom,¹⁸ necessity, utility, and expediency¹⁹ of legislation are exclusively matters for legislative determination. The Constitution assumes that absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process, and that judicial intervention is generally unwarranted no matter how unwise a court may think that the political branch has acted, and thus, a statute will not be overturned, unless varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that it can only be concluded that the legislature's actions were irrational.²⁰

The propriety or impropriety of legislation is not a factor relevant to its constitutional validity,²¹ nor is the necessity for the enactment of the legislation in question.²² State legislation that has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds the legislation unnecessary, in whole or in part, since individual states have broad latitude in experimenting with possible solutions to problems of vital local concern.²³

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Footnotes

- 1 As to this precept of constitutional adjudication, see § 183.
- 2 *Shevlin-Carpenter Co. v. State of Minn.*, 218 U.S. 57, 30 S. Ct. 663, 54 L. Ed. 930 (1910); *Illinois Cigarette Service Co. v. City of Chicago*, 89 F.2d 610, 111 A.L.R. 749 (C.C.A. 7th Cir. 1937); *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 18 So. 2d 810 (1944); *Ward v. Leche*, 189 La. 113, 179 So. 52 (1938); *Lapolla v. Board of Ed. of City of New York*, 172 Misc. 364, 15 N.Y.S.2d 149 (Sup 1939), judgment aff'd, 258 A.D. 781, 15 N.Y.S.2d 721 (1st Dep't 1939), judgment aff'd, 282 N.Y. 674, 26 N.E.2d 807 (1940); *Morrison v. Lamarre*, 75 R.I. 176, 65 A.2d 217 (1949).
- 3 *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936); *Gant v. Oklahoma City*, 289 U.S. 98, 53 S. Ct. 530, 77 L. Ed. 1058 (1933); *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 51 S. Ct. 228, 75 L. Ed. 482 (1931); *DeSalle v. Wright*, 969 F.2d 273, 23 Fed. R. Serv. 3d 123 (7th Cir. 1992); *Steinberg-Baum & Co. v. Countryman*, 247 Iowa 923, 77 N.W.2d 15 (1956); *Hite v. Hite*, 301 Mass. 294, 17 N.E.2d 176, 119 A.L.R. 517 (1938); *N.H. Lyons & Co. v. Corsi*, 3 N.Y.2d 60, 163 N.Y.S.2d 677, 143 N.E.2d 392 (1957).
- 4 *U.S. ex rel Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 29 S. Ct. 527, 53 L. Ed. 836 (1909).
- 5 *District of Columbia v. Brooke*, 214 U.S. 138, 29 S. Ct. 560, 53 L. Ed. 941 (1909); *State v. City of Stuart*, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307 (1929).
- 6 *Flemming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960); *Jacobs v. City of Chariton*, 245 Iowa 1378, 65 N.W.2d 561 (1954).
- 7 *Busser v. Snyder*, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515 (1925).
- 8 *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011); *I.N.S. v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).
- 9 *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, 58 S. Ct. 510, 82 L. Ed. 734 (1938); *Steele v. Gann*, 197 Ark. 480, 123 S.W.2d 520, 120 A.L.R. 754 (1939); *People v. Sevel*, 120 Cal.

App. 2d Supp. 907, 261 P.2d 359 (App. Dep't Super. Ct. 1953); State ex rel. Hogan v. Spencer, 139 Fla. 237, 190 So. 506 (1939); Great Atlantic & Pacific Tea Co. v. Mayor and Commissioners of Danville, 367 Ill. 310, 11 N.E.2d 388, 113 A.L.R. 1386 (1937); State ex rel. Yuska v. Industrial Commission, 144 Ohio St. 187, 29 Ohio Op. 359, 58 N.E.2d 214 (1944); City of Austin v. Quick, 930 S.W.2d 678 (Tex. App. Austin 1996), writ granted, (Sept. 4, 1997) and judgment aff'd, 7 S.W.3d 109 (Tex. 1998); Concerned Residents of Gloucester County v. Board of Sup'r's of Gloucester County, 248 Va. 488, 449 S.E.2d 787 (1994); State v. Kohler, 200 Wis. 518, 228 N.W. 895, 69 A.L.R. 348 (1930).

10 Mutual Loan Co v. Martell, 222 U.S. 225, 32 S. Ct. 74, 56 L. Ed. 175 (1911); Fearon v. Treanor, 272 N.Y. 268, 5 N.E.2d 815, 109 A.L.R. 1229 (1936).

11 Williams v. Quill, 277 N.Y. 1, 12 N.E.2d 547 (1938).

12 Newberry Station Homeowners Ass'n, Inc. v. Board of Sup'r's of Fairfax County, 285 Va. 604, 740 S.E.2d 548 (2013).

13 Norman v. Baltimore & O.R. Co., 294 U.S. 240, 55 S. Ct. 407, 79 L. Ed. 885, 95 A.L.R. 1352 (1935); Murphy v. Edmonds, 325 Md. 342, 601 A.2d 102 (1992); Newberry Station Homeowners Ass'n, Inc. v. Board of Sup'r's of Fairfax County, 285 Va. 604, 740 S.E.2d 548 (2013).

14 Hodel v. Indiana, 452 U.S. 314, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981).

15 U.S. v. First Nat. Bank of Detroit, Minn., 234 U.S. 245, 34 S. Ct. 846, 58 L. Ed. 1298 (1914); Steinberg-Baum & Co. v. Countryman, 247 Iowa 923, 77 N.W.2d 15 (1956); Cochran's Ex'r and Trustee v. Commonwealth, 241 Ky. 656, 44 S.W.2d 603, 78 A.L.R. 710 (1931); Rodriguez v. Brand West Dairy, 2016-NMSC-029, 378 P.3d 13 (N.M. 2016); Judd v. Board of Education of Union Free School Dist. No. 2, Town of Hempstead, Nassau County, 278 N.Y. 200, 15 N.E.2d 576, 118 A.L.R. 789 (1938); Asbury Hospital v. Cass County, 72 N.D. 359, 7 N.W.2d 438 (1943); Board of Elections for Franklin County v. State ex rel. Schneider, 128 Ohio St. 273, 191 N.E. 115, 97 A.L.R. 1417 (1934); Com. v. Girard Life Ins. Co., 305 Pa. 558, 158 A. 262, 83 A.L.R. 460 (1932), aff'd, 287 U.S. 570, 53 S. Ct. 94, 77 L. Ed. 501 (1932); Gorham v. Robinson, 57 R.I. 1, 186 A. 832 (1936).

16 American Federation of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145, 160 A.L.R. 873 (1944); Knapp v. Fasbender, 1 N.Y.2d 212, 151 N.Y.S.2d 668, 134 N.E.2d 482 (1956).

17 Gant v. Oklahoma City, 289 U.S. 98, 53 S. Ct. 530, 77 L. Ed. 1058 (1933); Bergerman v. Gerosa, 208 Misc. 477, 144 N.Y.S.2d 95 (Sup 1955), order aff'd, 2 A.D.2d 659, 152 N.Y.S.2d 363 (1st Dep't 1956), order aff'd, 3 N.Y.2d 855, 166 N.Y.S.2d 306, 145 N.E.2d 22 (1957).

18 Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961); F.T.C. v. Simplicity Pattern Co., 360 U.S. 55, 79 S. Ct. 1005, 3 L. Ed. 2d 1079 (1959); U.S. v. Petrillo, 332 U.S. 1, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947); U.S. v. American Union Transport, 327 U.S. 437, 66 S. Ct. 644, 90 L. Ed. 772 (1946); Markham v. Cabell, 326 U.S. 404, 66 S. Ct. 193, 90 L. Ed. 165 (1945); Glass City Bank of Jeanette, Pa., v. U.S., 326 U.S. 265, 66 S. Ct. 108, 90 L. Ed. 56 (1945); Nebbia v. People of New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); In re Stansell, 395 B.R. 457 (Bankr. D. Idaho 2008); Allinder v. City of Homewood, 254 Ala. 525, 49 So. 2d 108, 22 A.L.R.2d 763 (1950); Roberts v. Spray, 71 Ariz. 60, 223 P.2d 808 (1950); Naismith Dental Corp. v. Board of Dental Examiners, 68 Cal. App. 3d 253, 137 Cal. Rptr. 133 (1st Dist. 1977); State v. Hanusiak, 4 Conn. Cir. Ct. 34, 225 A.2d 208 (App. Div. 1966); People v. Warren, 173 Ill. 2d 348, 219 Ill. Dec. 533, 671 N.E.2d 700 (1996); Boehm v. Town of St. John, 675 N.E.2d 318 (Ind. 1996); G. I. Veterans' Taxicab Ass'n v. Yellow Cab Co., 192 Md. 551, 65 A.2d 173, 8 A.L.R.2d 568 (1949); Rohan v. Detroit Racing Ass'n, 314 Mich. 326, 22 N.W.2d 433, 166 A.L.R. 1246 (1946); Dayton Co. v. Carpet, Linoleum and Resilient Floor Decorators' Union, Local No. 596, AFL, 229 Minn. 87, 39 N.W.2d 183 (1949); Mississippi State University v. People for Ethical Treatment of Animals, Inc., 992 So. 2d 595 (Miss. 2008); State ex rel. Kennedy v. District Court of Fifth Judicial Dist. in and for Beaverhead County, 121 Mont. 320, 194 P.2d 256, 2 A.L.R.2d 1050 (1948); Lane Distributors v. Tilton, 7 N.J. 349, 81 A.2d 786 (1951); Madrid v. St. Joseph Hosp., 1996-NMSC-064, 122 N.M. 524, 928 P.2d 250 (1996); State v. Franklin, 2018-NMSC-015, 413 P.3d 861 (N.M. 2018); Board of Ed. of City School Dist. of City of New York v. City of New York, 41 N.Y.2d 535, 394 N.Y.S.2d 148, 362 N.E.2d 948 (1977); State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St. 3d 451, 1999-Ohio-123, 715 N.E.2d 1062 (1999); Ex parte Fowler, 85 Okla. Crim. 64, 184 P.2d 814 (1947); Shoul v. Commonwealth, Department of Transportation, Bureau of Driver Licensing, 643 Pa. 302, 173 A.3d 669 (2017); Morrison v. Lamarre, 75 R.I. 176, 65 A.2d 217 (1949); In re Department of Family & Protective

- Services, 273 S.W.3d 637 (Tex. 2009); Marshall v. Northern Virginia Transp. Authority, 275 Va. 419, 657 S.E.2d 71 (2008); Jones v. Jones, 48 Wash. 2d 862, 296 P.2d 1010, 54 A.L.R.2d 1403 (1956); State ex rel. Cashman v. Sims, 130 W. Va. 430, 43 S.E.2d 805, 172 A.L.R. 1389 (1947).
- 19 Greenough v. Tax Assessors of City of Newport, 331 U.S. 486, 67 S. Ct. 1400, 91 L. Ed. 1621, 172 A.L.R. 329 (1947); Dalton v. State Property and Buildings Commission, 304 S.W.2d 342 (Ky. 1957); Chronicle & Gazette Pub. Co. v. Attorney General, 94 N.H. 148, 48 A.2d 478, 168 A.L.R. 879 (1946); Staples v. Gilmer, 183 Va. 613, 33 S.E.2d 49, 158 A.L.R. 495 (1945).
- 20 Vance v. Bradley, 440 U.S. 93, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979).
- 21 People v. Friedman, 302 N.Y. 75, 96 N.E.2d 184 (1950); State v. Singletary, 247 N.C. App. 368, 786 S.E.2d 712 (2016); Marr v. Fisher, 182 Or. 383, 187 P.2d 966 (1947); State ex rel. Edwards v. Osborne, 195 S.C. 295, 11 S.E.2d 260 (1940).
- 22 Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 66 S. Ct. 850, 90 L. Ed. 1096 (1946); State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487 (1941); In re Porterfield, 28 Cal. 2d 91, 168 P.2d 706, 167 A.L.R. 675 (1946); Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949); Defiance Milk Products Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829 (1956); Concerned Residents of Gloucester County v. Board of Sup'rs of Gloucester County, 248 Va. 488, 449 S.E.2d 787 (1994).
- 23 Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

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16A Am. Jur. 2d Constitutional Law § 186

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Constitutional Law

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

5. Factors Irrelevant to Constitutionality

§ 186. Uniqueness, novelty, or redundancy of legislation as irrelevant factors in determination of constitutionality of legislation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  990 to 1005, 1030, 1031

The courts are not concerned with the uniqueness of a statute whose constitutionality is questioned,¹ and the fact that legislation is novel is no evidence of its unconstitutionality.² By the same token, the mere fact that a statute is redundant, standing alone, is not a ground for a constitutional attack upon the statute.³

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Footnotes

¹ *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 106 N.E.2d 124 (1952).

² *Feldman v. City of Cincinnati*, 20 F. Supp. 531, 9 Ohio Op. 149 (S.D. Ohio 1937).

While novelty does not create a presumption of unconstitutionality, a court may well find, in certain circumstances, that the lack of historical precedent for an entity raises a red flag. *Consumer Financial Protection Bureau v. ITT Educational Services, Inc.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015), stay pending appeal denied, 2016 WL 10459784 (S.D. Ind. 2016).

³ *Com. v. Foley*, 798 S.W.2d 947 (Ky. 1990) (overruled on other grounds by, *Martin v. Com.*, 96 S.W.3d 38 (Ky. 2003)).

16A Am. Jur. 2d Constitutional Law § 187

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Constitutional Law

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

5. Factors Irrelevant to Constitutionality

§ 187. Legislative motivation as irrelevant factor in determination of constitutionality of legislation

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 999

As a general rule, courts cannot declare a statute void because of alleged improper motives that influenced certain members of the legislature that passed the law,¹ because legislation has been sponsored and promoted by "those who advantage from it"² or "special interests,"³ or because of the political considerations which may have motivated the adoption of a statute.⁴

Just as bad motives of the legislators do not nullify laws passed within the bounds of the Constitution, good motives or good faith on the part of the legislators in passing a law will be ineffective in sustaining it if it clearly violates the provisions of the Constitution.⁵ However, meritorious its purpose, legislation must of necessity conform to fundamental constitutional principles.⁶

There is a general presumption of good faith that attaches to all lawmaking bodies⁷—that is, primarily the courts will assume that the lawmaking body considers the effect of legislation on the constitutional rights of citizens, that it acts from patriotic and just motives⁸ and with due regard for the framers' and people's intent,⁹ in pursuit of a legitimate object,¹⁰ and that a legislature has acted within its constitutional powers.¹¹ In addition, courts generally should use the plain language of the statutes themselves as evidence of the legislature's intent, not make inquiries into motivations of the legislature.¹²

Observation:

The Federal Supreme Court has recognized for a very long time that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government.¹³ Moreover, the Court has explained that inquiries into congressional motives or purposes are a hazardous matter from a pragmatic standpoint. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress's purpose. It is entirely a different matter when the Court is asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of members of Congress said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high to eschew guesswork.¹⁴

Thus, where the courts do make an inquiry into legislative motivation, selected statements reflecting a particular motivation for the statute that would render it unconstitutional, even when made by the sponsor of the legislation, are generally not sufficient to overcome the presumption of constitutionality that attends the statute.¹⁵ If, however, proof of a racially discriminatory purpose in a local rezoning decision is admitted in evidence, the burden shifts to the decision-making authority to establish that the same decision would have resulted even had the impermissible purpose not been considered.¹⁶

However, this rule against judicial consideration or inquiry concerning legislative motive does not extend to:

- statutes that disclose motives on their faces or that imply motives in their operation¹⁷
- statutes that disclose on their faces that their inevitable effect may render them unconstitutional¹⁸
- statutes alleged to violate the Equal Protection Clause on racially discriminatory grounds¹⁹
- a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose,²⁰ such as cases determining whether a statute is a bill of attainder²¹ or cases determining whether a statute imposes, without a trial affording full criminal procedure rights, civil sanctions that are actually penal in nature²²

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Footnotes

- 1 Masonic Cemetery Ass'n v. Gamage, 38 F.2d 950, 71 A.L.R. 1027 (C.C.A. 9th Cir. 1930).
- 2 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).
- 3 People v. Abrahams, 40 N.Y.2d 277, 386 N.Y.S.2d 661, 353 N.E.2d 574 (1976).
- 4 Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952).
- 5 Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935).
- 6 Volusia County Kennel Club v. Haggard, 73 So. 2d 884 (Fla. 1954).

- 7 Sperry & Hutchinson Co. v. Hoegh, 246 Iowa 9, 65 N.W.2d 410 (1954); Cowan v. City of Buffalo, 247 A.D. 591, 288 N.Y.S. 239 (4th Dep't 1936); Hoyne v. Wurstner, 43 Ohio L. Abs. 570, 63 N.E.2d 229 (Ct. App. 2d Dist. Montgomery County 1945); State v. McGrier, 378 S.C. 320, 663 S.E.2d 15 (2008).
8 Amsel v. Brooks, 141 Conn. 288, 106 A.2d 152, 45 A.L.R.2d 1234 (1954).
9 Liddell v. Heavner, 2008 OK 6, 180 P.3d 1191 (Okla. 2008).
10 In re Joint Legislative Committee to Investigate Educational System of State of New York, 285 N.Y. 1, 32 N.E.2d 769 (1941).
11 Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990); Harrah's Bossier City Inv. Co., LLC v. Bridges, 41 So. 3d 438 (La. 2010); State v. McGrier, 378 S.C. 320, 663 S.E.2d 15 (2008).
When the court addresses a facial constitutional challenge, the laws enacted by the elected representatives of the people of the state are entitled to the deference of the courts; the court is bound to assume that, in the passage of any law, the legislature acted with full knowledge of all constitutional restrictions and intelligently, honestly and discriminately decided that they were acting within their constitutional limits and powers, and that deference is further expressed in the presumption of constitutionality afforded State statutes. *In re Guardianship of Chamberlain*, 2015 ME 76, 118 A.3d 229 (Me. 2015).
12 State v. Carpenter, 197 Wis. 2d 252, 541 N.W.2d 105 (1995).
13 Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); Fletcher v. Peck, 10 U.S. 87, 3 L. Ed. 162, 1810 WL 1558 (1810).
14 U. S. v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).
15 State v. Carpenter, 197 Wis. 2d 252, 541 N.W.2d 105 (1995).
16 Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).
17 State v. McKune, 215 Wis. 592, 255 N.W. 916 (1934).
18 U. S. v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).
19 Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).
20 U. S. v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).
21 U.S. v. Lovett, 106 Ct. Cl. 856, 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946).
22 *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) (divestment of citizenship for leaving or remaining outside the United States at time of war and national emergency for the purpose of evading military service); *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (expatriation of a person convicted by military court-martial of desertion from the United States Army in wartime); *State v. Carpenter*, 197 Wis. 2d 252, 541 N.W.2d 105 (1995) (civil commitment of a sexually violent person).

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Constitutional Law

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

5. Factors Irrelevant to Constitutionality

§ 188. Correctness of legislative determination of factual issues as irrelevant factor in determination of constitutionality of legislation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  990 to 1005, 1030, 1031

On frequent occasions, the constitutionality of a statute depends on the existence or nonexistence of certain facts. In view of the presumption in favor of the validity of statutes,¹ it must be supposed that the legislature had before it when the statute was passed any evidence that was required to enable it to act;² and if any special finding of fact was needed in order to warrant the passage of the particular act, the passage of the act itself is treated as the equivalent of such a finding.³ It is presumed that the legislature, in enacting a statute, has investigated and found the facts necessary to support the legislation,⁴ together with the existence of a situation showing or indicating its need or desirability.⁵ Moreover, the validity of legislation that would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the lawmaking body may rationally believe the facts to be established.⁶

Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislature, the general rule is that the courts will acquiesce in the legislative decision, unless it is clearly erroneous,⁷ arbitrary, or wholly unwarranted.⁸

To the extent that Congress's findings of legislative facts are relevant to a judicial determination, those findings are entitled to due respect by the courts.⁹ For example, the United States Supreme Court must defer to a congressional finding that a regulated

activity affects interstate commerce if there is any rational basis for the finding and must ensure only that the means selected by Congress are reasonably adapted to the end permitted by the Constitution.¹⁰

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, these facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing the Court that those facts have ceased to exist.¹¹ Although the existence of constitutional facts upon which the validity of an enactment depends is presumed in the absence of any showing to the contrary, their nonexistence can properly be established by proof.¹² In addition, when examining constitutionally challenged legislation, the courts are required to review subsequent developments that may have changed the validity of information before the legislature at the time of the statutory enactment.¹³ Thus, a court must make every feasible attempt to discern the reasons for a legislative distinction before it declares that distinction irrational and unconstitutional.¹⁴ The burden is on the complainant to establish that the legislature acted in an arbitrary and irrational way.¹⁵ The party contesting a statute's constitutionality bears the burden of proving a constitutional deficiency and must establish the complete absence of any state of facts that would support the need for the statute's enactment.¹⁶

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Footnotes

- 1 §§ 165 to 170.
- 2 *Hart v. State*, 368 N.C. 122, 774 S.E.2d 281, 320 Ed. Law Rep. 465 (2015).
- 3 *§ 170.*
- 4 *Loftin v. Crowley's Inc.*, 150 Fla. 836, 8 So. 2d 909, 142 A.L.R. 626 (1942); *State ex rel. Sullivan v. Dammann*, 227 Wis. 72, 277 N.W. 687 (1938).
- 5 *People v. Christian*, 96 Misc. 2d 1109, 410 N.Y.S.2d 513 (N.Y. City Crim. Ct. 1978).
- 6 *Schulz v. State Executive*, 138 A.D.3d 1197, 30 N.Y.S.3d 721 (3d Dep't 2016).
- 7 *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 3 S.E.2d 705 (1939).
- 8 *McSween v. State Live Stock Sanitary Board of Florida*, 97 Fla. 750, 122 So. 239, 65 A.L.R. 508 (1929); *Smith v. Command*, 231 Mich. 409, 204 N.W. 140, 40 A.L.R. 515 (1925); *Herrin v. Arnold*, 1938 OK 440, 183 Okla. 392, 82 P.2d 977, 119 A.L.R. 1471 (1938); *Poulnot v. Cantwell*, 129 S.C. 171, 123 S.E. 651 (1924); *Bristol Redevelopment and Housing Authority v. Denton*, 198 Va. 171, 93 S.E.2d 288 (1956); *Chapman v. Huntington, W. Va., Housing Authority*, 121 W. Va. 319, 3 S.E.2d 502 (1939).
- 9 *Riddle v. Mondragon*, 83 F.3d 1197 (10th Cir. 1996); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Harvey v. Blewett*, 151 Mont. 427, 443 P.2d 902 (1968); *Bristol Redevelopment and Housing Authority v. Denton*, 198 Va. 171, 93 S.E.2d 288 (1956); *Chapman v. Huntington, W. Va., Housing Authority*, 121 W. Va. 319, 3 S.E.2d 502 (1939).
- 10 *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966).
- 11 *Preseault v. I.C.C.*, 494 U.S. 1, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990).
- 12 *U.S. v. Carolene Products Co.*, 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938); *Publix Cleaners v. Florida Dry Cleaning and Laundry Bd.*, 32 F. Supp. 31 (S.D. Fla. 1940).
- 13 *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Com.*, 239 Cal. App. 4th 1000, 191 Cal. Rptr. 3d 776 (3d Dist. 2015).
- 14 *People v. Askew*, 93 Misc. 2d 754, 403 N.Y.S.2d 959 (Sup 1978).
- 15 *Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991).

Applying a rational basis test, the reviewing court presumes the constitutionality of a state action by requiring those challenging the legislative judgment to convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by a governmental decisionmaker; the state action need not even actually advance its stated purpose, and the court instead inquires whether the government could have had a legitimate reason for acting as it did. *Pickup v. Brown*,

42 F. Supp. 3d 1347 (E.D. Cal. 2012), aff'd, 728 F.3d 1042 (9th Cir. 2013), and aff'd, 740 F.3d 1208 (9th Cir. 2014).

15 Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir. 1996); Sheridan Square Partnership v. U.S., 66 F.3d 1105 (10th Cir. 1995); Albright v. U.S., 10 F.3d 790 (Fed. Cir. 1993); Love v. Whirlpool Corp., 264 Ga. 701, 449 S.E.2d 602 (1994); Ayres v. Townsend, 324 Md. 666, 598 A.2d 470 (1991); Cerny v. Salter, 311 S.C. 430, 429 S.E.2d 809 (1993); Massachusetts Mun. Wholesale Elec. Co. v. State, 161 Vt. 346, 639 A.2d 995 (1994); Concerned Residents of Gloucester County v. Board of Sup'rs of Gloucester County, 248 Va. 488, 449 S.E.2d 787 (1994).

16 In re D.P., 2013 ME 40, 65 A.3d 1216 (Me. 2013).

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16A Am. Jur. 2d Constitutional Law § 189

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Constitutional Law

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

5. Factors Irrelevant to Constitutionality

§ 189. Correctness of legislative determination of factual issues as irrelevant factor in determination of constitutionality of legislation—Determination and declaration of emergency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  990 to 1005, 1030, 1031

Emergency situations do not obliterate constitutional guarantees, but they are relevant to their application.¹ The absence of any emergency, however, eliminates any claim that necessity justifies otherwise dubious measures.² With reference to a determination and declaration of an emergency by a legislative body, the generally prevailing view is that such a question is primarily for that body to determine, but that its determination is not conclusive and is subject to review by the courts. This view has been followed with respect to state legislatures and statutes³ and local legislative bodies and ordinances.⁴

The view is not, however, universal, and there are some cases holding that a state⁵ or local⁶ legislative determination of an emergency is conclusive on the courts, even though they may feel that the reasons for the declaration of an emergency stated by the legislative body are not satisfactory, except, perhaps, where the declaration of a statute or ordinance as an emergency measure is for reasons that are obviously illusory or tautological.⁷

A hybrid view is that a city council's resolution that an emergency exists is binding on the courts, unless it is apparent from the ordinance itself that an emergency does not and could not exist.⁸

Footnotes

- 1 U.S. v. Gulla, 833 F. Supp. 274 (S.D. N.Y. 1993).
- 2 U.S. v. Gulla, 833 F. Supp. 274 (S.D. N.Y. 1993).
- 3 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A.L.R. 1481 (1934); Chiles v. United Faculty of Florida, 615 So. 2d 671 (Fla. 1993), opinion clarified, 143 L.R.R.M. (BNA) 2806, 1993 WL 13650259 (Fla. 1993); State ex rel. Fulton v. Ives, 123 Fla. 401, 167 So. 394 (1936); People ex rel. Murray v. Holmes, 341 Ill. 23, 173 N.E. 145, 71 A.L.R. 1327 (1930); First Trust Joint Stock Land Bank of Chicago v. Arp, 225 Iowa 1331, 283 N.W. 441, 120 A.L.R. 932 (1939); State ex rel. State Board of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504, 179 A. 116 (Ct. Err. & App. 1935); Todd v. Tierney, 1933-NMSC-094, 38 N.M. 15, 27 P.2d 991 (1933); State ex rel. Cleveringa v. Klein, 63 N.D. 514, 249 N.W. 118, 86 A.L.R. 1523 (1933); Engelcke v. Farmers' State Bank of Canistota, 61 S.D. 92, 246 N.W. 288 (1932).
4 Town of Burnsville v. City of Bloomington, 268 Minn. 84, 128 N.W.2d 97 (1964); State ex rel. Tyler v. Davis, 443 S.W.2d 625 (Mo. 1969); Murphy v. Town of West New York, 130 N.J.L. 341, 32 A.2d 850 (N.J. Sup. Ct. 1943); Raynor v. Commissioners for Town of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941); State ex rel. Lindstrom v. Goetz, 73 S.D. 633, 47 N.W.2d 566 (1951); Artcarved Class Rings, Inc. v. City of Austin, 551 S.W.2d 788 (Tex. Civ. App. Eastland 1977), writ refused, (Oct. 19, 1977); State ex rel. Gray v. Martin, 29 Wash. 2d 799, 189 P.2d 637 (1948); Larson v. Larson, 30 Wis. 2d 291, 140 N.W.2d 230 (1966).
5 Hill v. Taylor, 264 Ky. 708, 95 S.W.2d 566 (1936); Hutchens v. Jackson, 1933-NMSC-051, 37 N.M. 325, 23 P.2d 355 (1933); State ex rel. Schorr v. Kennedy, 132 Ohio St. 510, 8 Ohio Op. 494, 9 N.E.2d 278, 110 A.L.R. 1428 (1937); Artcarved Class Rings, Inc. v. City of Austin, 551 S.W.2d 788 (Tex. Civ. App. Eastland 1977), writ refused, (Oct. 19, 1977).
Generally, as to emergency police legislation based on necessity, see § 338.
6 City of Phoenix v. Landrum & Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951); Glackman v. City of Miami Beach, 51 So. 2d 294 (Fla. 1951); Biggs v. Maryland-National Capital Park and Planning Commission, 269 Md. 352, 306 A.2d 220 (1973); State ex rel. Davis Inv. Co. v. City of Columbus, 175 Ohio St. 337, 25 Ohio Op. 2d 244, 194 N.E.2d 859 (1963); In re Supreme Court Referendum Petition in Ponca City, Concerning Ordinance No. 4478, 1974 OK 101, 530 P.2d 120 (Okla. 1974); Greenberg v. Lee, 196 Or. 157, 248 P.2d 324, 35 A.L.R.2d 567 (1952); Artcarved Class Rings, Inc. v. City of Austin, 551 S.W.2d 788 (Tex. Civ. App. Eastland 1977), writ refused, (Oct. 19, 1977).
7 Walsh v. Cincinnati City Council, 54 Ohio App. 2d 107, 8 Ohio Op. 3d 208, 375 N.E.2d 811 (1st Dist. Hamilton County 1977).
8 Western Heights Land Corp. v. City of Fort Collins, 146 Colo. 464, 362 P.2d 155 (1961).

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Constitutional Law

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

6. Burden, Quantum, and Sufficiency of Proof

§ 190. Burden of proof in constitutional challenge to legislation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1030 to 1040

A party who alleges the unconstitutionality of a statute normally has the burden of substantiating the claim.¹ The burden is a heavy one,² since all acts of the legislature are presumed constitutional.³ To sustain it, the assailant of the statute must negate every reasonable,⁴ conceivable⁵ basis that might support the statute and must be able to point out the particular provision that has been violated and the ground on which it has been infringed.⁶ Where the attack on the statute is a facial one, in fact, the complainant must establish that no set of circumstances exists under which the act may be held valid⁷ and must overcome the strong presumption in favor of its validity,⁸ which continues until the contrary is proved.⁹ One must show how, as to him or her, the legislation in question is unconstitutional.¹⁰ These principles apply to general economic and social-welfare legislation, so that the burden is on the party complaining that a statute violates due process to establish that the legislature has acted in an arbitrary and irrational way,¹¹ and that burden is heavy.¹² Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the state.¹³ The principles apply not only to state statutes but also to municipal ordinances.¹⁴

However, these principles do not apply to statutes or ordinances restricting speech and other fundamental rights; instead, the burden of proof in such cases rests with those who have imposed the restrictions.¹⁵ When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.¹⁶

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Footnotes

- 1 League of Women Voters v. Diamond, 965 F. Supp. 96 (D. Me.1997); F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993); National R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co., 470 U.S. 451, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985); Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 103 S. Ct. 3524, 77 L. Ed. 2d 1284 (1983); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983); International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996); Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir. 1996); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); In re Seltzer, 104 F.3d 234 (9th Cir. 1996); Riddle v. Mondragon, 83 F.3d 1197 (10th Cir. 1996); Albright v. U.S., 10 F.3d 790 (Fed. Cir. 1993); Southeast Alaska Conservation Council v. State, 202 P.3d 1162, 242 Ed. Law Rep. 419 (Alaska 2009); City of Ft. Smith v. McCutchen, 372 Ark. 541, 279 S.W.3d 78 (2008); Rodriguez v. Schutt, 914 P.2d 921 (Colo. 1996) (holding modified on other grounds by, Sperry v. Field, 205 P.3d 365 (Colo. 2009)); Morascini v. Commissioner of Public Safety, 236 Conn. 781, 675 A.2d 1340 (1996); Belk v. Westbrooks, 266 Ga. 628, 469 S.E.2d 149 (1996); State v. Mendoza, 82 Haw. 143, 920 P.2d 357 (1996); Rhodes v. Industrial Com'n, 125 Idaho 139, 868 P.2d 467 (1993); People v. Ashley, 2020 IL 123989, 2020 WL 398631 (Ill. 2020); Brown v. State, 868 N.E.2d 464 (Ind. 2007); League of Women Voters v. Secretary of State, 683 A.2d 769 (Me. 1996).answer to certified question conformed to,Civitarese v. Town of Middleborough, 412 Mass. 695, 591 N.E.2d 1091 (1992); Consolidated School District No. 1 of Jackson County v. Jackson County, 936 S.W.2d 102 (Mo. 1996); State v. Helfrich, 277 Mont. 452, 922 P.2d 1159 (1996); Sherman T. v. Karyn N., 286 Neb. 468, 837 N.W.2d 746 (2013); Skipper v. State, 110 Nev. 1031, 879 P.2d 732 (1994); State v. Carter, 167 N.H. 161, 106 A.3d 1165 (2014); Wood v. Irving, 85 N.Y.2d 238, 623 N.Y.S.2d 824, 647 N.E.2d 1332 (1995); Columbia Gas Transm. Corp. v. Levin, 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400 (2008); EOG Resources Marketing, Inc. v. Oklahoma State Bd. of Equalization, 2008 OK 95, 196 P.3d 511 (Okla. 2008), as corrected, (Oct. 24, 2008); Com. v. Jenner, 545 Pa. 445, 681 A.2d 1266 (1996); State v. Fonseca, 670 A.2d 1237 (R.I. 1996); Sandy Springs Water Co. v. Department of Health and Environmental Control, 324 S.C. 177, 478 S.E.2d 60 (1996); Green v. Siegel, Barnett & Schutz, 1996 SD 146, 557 N.W.2d 396 (S.D. 1996); State v. Tester, 879 S.W.2d 823 (Tenn. 1994); Navarro v. State, 535 S.W.3d 162 (Tex. App. Waco 2017), petition for discretionary review refused, (Mar. 7, 2018); County Bd. of Equalization of Salt Lake County v. Utah State Tax Com'n, 927 P.2d 176, 114 Ed. Law Rep. 653 (Utah 1996); Massachusetts Mun. Wholesale Elec. Co. v. State, 161 Vt. 346, 639 A.2d 995 (1994); City Council of City of Salem v. Wendy's of Western Virginia, Inc., 252 Va. 12, 471 S.E.2d 469 (1996); Ferguson v. Commonwealth, 71 Va. App. 546, 838 S.E.2d 75 (2020); State v. Crediford, 130 Wash. 2d 747, 927 P.2d 1129 (1996); State v. Thiel, 183 Wis. 2d 505, 515 N.W.2d 847 (1994); In Interest of NJC, 913 P.2d 435 (Wyo. 1996).
- 2 Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 103 S. Ct. 3524, 77 L. Ed. 2d 1284 (1983); Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir. 1996); Meek v. Unocal Corp., 914 P.2d 1276 (Alaska 1996); Dutkiewicz v. Dutkiewicz, 289 Conn. 362, 957 A.2d 821 (2008); Armstrong v. State, 22 N.E.3d 629 (Ind. Ct. App. 2014); Civitarese v. Town of Middleborough, 412 Mass. 695, 591 N.E.2d 1091 (1992); Matter of J.M.M. o/b/o Minors for a Change of Name, 937 N.W.2d 743 (Minn. 2020); State v. Winslow, 134 N.H. 398, 593 A.2d 238 (1991); Com. v. Jenner, 545 Pa. 445, 681 A.2d 1266 (1996); Fouse v. Saratoga Partners, L.P., 204 A.3d 1028 (Pa. Commw. Ct. 2019), appeal granted, 217 A.3d 794 (Pa. 2019) (formidable); Black v. Central Puget Sound Regional Transit Authority, 457 P.3d 453 (Wash. 2020).
- As to the sufficiency and quantum of proof of unconstitutionality, generally, see §§ 191 to 193.
- 3 Bouchard v. Department of Public Safety, 2015 ME 50, 115 A.3d 92 (Me. 2015).
- As to the presumption of constitutionality, generally, see §§ 165 to 170.
- 4 U.S. v. Pickard, 100 F. Supp. 3d 981 (E.D. Cal. 2015); Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 861 P.2d 1 (1993); Zaber v. City of Dubuque, 789 N.W.2d 634 (Iowa 2010); State United Teachers, ex rel. Magee v. State, 140 A.D.3d 90, 31 N.Y.S.3d 618, 330 Ed. Law Rep. 812 (3d Dep't 2016).
- 5 F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993); Chance Management, Inc. v. State of S.D., 97 F.3d 1107 (8th Cir. 1996); Riddle v. Mondragon, 83 F.3d 1197 (10th Cir. 1996); Steffan v. Perry, 41 F.3d 677, 96 Ed. Law Rep. 32 (D.C. Cir. 1994); Mostowy v. U.S., 966 F.2d

668 (Fed. Cir. 1992); *Alaska Judicial Council v. Kruse*, 331 P.3d 375 (Alaska 2014); *Katmailand, Inc. v. Lake and Peninsula Borough*, 904 P.2d 397 (Alaska 1995); *D.A. Pincus and Co., Inc. v. Meehan*, 235 Conn. 865, 670 A.2d 1278 (1996); *Civitarese v. Town of Middleborough*, 412 Mass. 695, 591 N.E.2d 1091 (1992); *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400 (2008).

6 *Toombs v. Citizens' Bank of Waynesboro*, 281 U.S. 643, 50 S. Ct. 434, 74 L. Ed. 1088 (1930); *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 39 S. Ct. 227, 63 L. Ed. 527 (1919); *Mountain Timber Co. v. State of Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); *Erie R. Co. v. Williams*, 233 U.S. 685, 34 S. Ct. 761, 58 L. Ed. 1155 (1914); *Dickinson v. Porter*, 240 Iowa 393, 35 N.W.2d 66 (1948); *Ward v. Leche*, 189 La. 113, 179 So. 52 (1938).

Because a classification that involves neither a fundamental right nor a suspect classification is presumed constitutional for equal protection purposes, the burden is on one attacking the legislative arrangement to negative every conceivable basis which might support it. *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 132 S. Ct. 2073, 182 L. Ed. 2d 998 (2012).

7 *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990); *U.S. v. Sage*, 92 F.3d 101 (2d Cir. 1996); *Jordan by Jordan v. Jackson*, 15 F.3d 333 (4th Cir. 1994); *Barnes v. State of Miss.*, 992 F.2d 1335 (5th Cir. 1993); *Dean v. McWherter*, 70 F.3d 43, 1995 FED App. 0334P (6th Cir. 1995); *HSH, Inc. v. City of El Cajon*, 44 F. Supp. 3d 996 (S.D. Cal. 2014); *Javed v. Department of Public Safety, Div. of Motor Vehicles*, 921 P.2d 620 (Alaska 1996); *People v. Juvenile Court, City and County of Denver*, 893 P.2d 81 (Colo. 1995); *Kaneohe Bay Cruises, Inc. v. Hirata*, 75 Haw. 250, 861 P.2d 1 (1993); *State v. Powdrill*, 684 So. 2d 350 (La. 1996); *State v. Weddle*, 2020 ME 12, 2020 WL 424922 (Me. 2020); *Spare-Time Recreation, Inc. v. State*, 666 A.2d 81 (Me. 1995); *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377 (2008).

A facial constitutional challenge to a statute is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the statute would be valid. *1-800-411-Pain Referral Service, LLC v. Otto*, 744 F.3d 1045 (8th Cir. 2014).

8 *Concordia Fire Ins. Co. v. People of State of Illinois*, 292 U.S. 535, 54 S. Ct. 830, 78 L. Ed. 1411 (1934); *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102, 87 A.L.R. 374 (1932); *Dribin v. Superior Court In and For Los Angeles County*, 37 Cal. 2d 345, 231 P.2d 809, 24 A.L.R.2d 864 (1951); *State v. Di Paglia*, 247 Iowa 79, 71 N.W.2d 601, 49 A.L.R.2d 1223 (1955).

To succeed in a facial challenge, the plaintiff has a heavy burden to show the statute is unconstitutional in all or most cases, and cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. *Arcadia Development Co. v. City of Morgan Hill*, 197 Cal. App. 4th 1526, 129 Cal. Rptr. 3d 369 (6th Dist. 2011).

9 *Ball v. Branch*, 154 Fla. 57, 16 So. 2d 524 (1944).

As to determination of facial challenge to constitutionality of legislation, see § 179.

10 *Stockholders of Peoples Banking Co. of Smithsburg, Md. v. Sterling*, 300 U.S. 175, 57 S. Ct. 386, 81 L. Ed. 586 (1937); *Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226, 56 S. Ct. 754, 80 L. Ed. 1155 (1936); *Whitney Nat. Bank of New Orleans v. Little Creek Oil Co.*, 212 La. 949, 33 So. 2d 693 (1947); *Oriental Boulevard Co. v. Heller*, 27 N.Y.2d 212, 316 N.Y.S.2d 226, 265 N.E.2d 72 (1970); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940); *State v. Amerada Petroleum Corp.*, 71 N.W.2d 675 (N.D. 1955). *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993); *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62, 324 Ill. Dec. 491, 896 N.E.2d 277 (2008).

11 *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Muller v. Lujan*, 928 F.2d 207 (6th Cir. 1991).

12 *Abbott v. Perez*, 138 S. Ct. 2305, 201 L. Ed. 2d 714 (2018).

13 *DeVoe v. City of Missoula*, 2012 MT 72, 364 Mont. 375, 274 P.3d 752 (2012); *Monarski v. Alexandrides*, 80 Misc. 2d 260, 362 N.Y.S.2d 976 (Sup 1974); *City of East Cleveland v. Palmer*, 40 Ohio App. 2d 10, 69 Ohio Op. 2d 6, 317 N.E.2d 246 (8th Dist. Cuyahoga County 1974); *Rothschild v. Richland County Bd. of Adjustment*, 309 S.C. 194, 420 S.E.2d 853 (1992).

14 *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124 (4th Cir. 1996); *State v. Melchert-Dinkel*, 844 N.W.2d 13, 96 A.L.R.6th 755 (Minn. 2014).

16

[McCutcheon v. Federal Election Com'n, 572 U.S. 185, 134 S. Ct. 1434, 188 L. Ed. 2d 468 \(2014\); Wisconsin Right To Life, Inc. v. Barland, 751 F.3d 804 \(7th Cir. 2014\).](#)

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

6. Burden, Quantum, and Sufficiency of Proof

§ 191. Quantum of proof in constitutional challenge to legislation; proof showing "clear," "palpable," or "manifest" violation of constitution

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  995, 996, 1030 to 1040

Generally speaking, it is the duty of the courts to uphold any statute enacted in the ordinary exercise of the legislative power, if it is possible to do so without disregarding the plain command or necessary implication of the fundamental law.¹ The court begins its task of determining the constitutionality of a statute by implementing the presumption in favor of constitutionality.² The presumption is not conclusive, however, and the party challenging the statute may rebut it by demonstrating that the statute contravenes the State or Federal Constitution.³

Different jurisdictions prescribe different standards for the quantum of proof required to rebut the presumption and show the statute to be unconstitutional. The least burdensome version of such a requirement is that the statute's invalidity must be made to appear clearly or plainly,⁴ fully,⁵ unequivocally,⁶ undoubtedly,⁷ palpably,⁸ convincingly,⁹ unmistakably,¹⁰ inescapably,¹¹ and by highly persuasive,¹² clear, and convincing¹³ irrefragable evidence.¹⁴

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Footnotes

¹ As to this duty, generally, see § 171.

² As to the presumption, generally, see § 165.

³ As to the conclusiveness of the presumption, generally, see § 167.

As to the contrary presumption regarding statutes that affect fundamental rights or suspect classifications, see § 168.

- 4 As to burdens of proof regarding statutes that affect fundamental rights or suspect classifications, see § 190.
Hodel v. Indiana, 452 U.S. 314, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981); People of State of N. Y. v. O'Neill, 359 U.S. 1, 79 S. Ct. 564, 3 L. Ed. 2d 585 (1959); Batanic v. I.N.S., 12 F.3d 662 (7th Cir. 1993); Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (9th Cir. 1994); Stratton v. Priest, 326 Ark. 469, 932 S.W.2d 321 (1996); Demery v. Georgia Real Estate Com'n, 266 Ga. 288, 466 S.E.2d 591 (1996); State v. Crouser, 81 Haw. 5, 911 P.2d 725 (1996); Burns v. Municipal Officers Electoral Board of Village of Elk Grove Village, 2020 IL 125714, 2020 WL 934396 (Ill. 2020); Wallace v. State, 905 N.E.2d 371 (Ind. 2009); Doherty v. Calcasieu Parish School Bd., 634 So. 2d 1172, 90 Ed. Law Rep. 968 (La. 1994); State v. McGillicuddy, 646 A.2d 354 (Me. 1994); Ayres v. Townsend, 324 Md. 666, 598 A.2d 470 (1991); Caterpillar, Inc. v. Department of Treasury, Revenue Div., 440 Mich. 400, 488 N.W.2d 182 (1992); Consolidated School District No. 1 of Jackson County v. Jackson County, 936 S.W.2d 102 (Mo. 1996); State ex rel. Shepherd v. Nebraska Equal Opportunity Com'n, 251 Neb. 517, 557 N.W.2d 684 (1997); Moldon v. County of Clark, 124 Nev. 507, 188 P.3d 76 (2008); State v. Muhammad, 145 N.J. 23, 678 A.2d 164 (1996); Brannon v. North Carolina State Bd. of Elections, 331 N.C. 335, 416 S.E.2d 390 (1992); State v. Ertelt, 548 N.W.2d 775 (N.D. 1996); Austintown Twp. Bd. of Trustees v. Tracy, 76 Ohio St. 3d 353, 1996-Ohio-74, 667 N.E.2d 1174 (1996); EOG Resources Marketing, Inc. v. Oklahoma State Bd. of Equalization, 2008 OK 95, 196 P.3d 511 (Okla. 2008), as corrected, (Oct. 24, 2008); Fouse v. Saratoga Partners, L.P., 204 A.3d 1028 (Pa. Commw. Ct. 2019), appeal granted, 217 A.3d 794 (Pa. 2019); Westvaco Corp. v. South Carolina Dept. of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995); West Two Rivers Ranch v. Pennington County, 1996 SD 70, 549 N.W.2d 683 (S.D. 1996); Hess v. Snyder Hunt Corp., 240 Va. 49, 392 S.E.2d 817 (1990); Arnold v. Department of Retirement Systems, 128 Wash. 2d 765, 912 P.2d 463 (1996); Moore v. State, 912 P.2d 1113 (Wyo. 1996).
5 Marr v. Fisher, 182 Or. 383, 187 P.2d 966 (1947).
6 Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 60 S. Ct. 517, 84 L. Ed. 774 (1940).
7 O'Brien v. Department of Public Safety, 589 S.W.3d 560 (Mo. 2019).
8 Board of Educ. of City of St. Louis v. Missouri State Bd. of Educ., 271 S.W.3d 1, 240 Ed. Law Rep. 441 (Mo. 2008); Southon v. Oklahoma Tire Recyclers, LLC, 2019 OK 37, 443 P.3d 566 (Okla. 2019); Liddell v. Heavner, 2008 OK 6, 180 P.3d 1191 (Okla. 2008); Com. v. Teeter, 2008 PA Super 272, 961 A.2d 890 (2008); Com. v. Hopkins, 632 Pa. 36, 117 A.3d 247 (2015); Green v. Siegel, Barnett & Schutz, 1996 SD 146, 557 N.W.2d 396 (S.D. 1996).
9 Johnson v. Gentry, 220 Cal. 231, 30 P.2d 400, 92 A.L.R. 1264 (1934); American Waste & Pollution Control Co. v. St. Martin Parish Police Jury, 627 So. 2d 158 (La. 1993); State v. Mosher, 2012 ME 133, 58 A.3d 1070 (Me. 2012).
10 Hobbs v. McGehee, 2015 Ark. 116, 458 S.W.3d 707 (2015); Persky v. Bushey, 21 Cal. App. 5th 810, 230 Cal. Rptr. 3d 658 (6th Dist. 2018), review denied, (May 1, 2018) and review filed; State v. Lee, 75 Haw. 80, 856 P.2d 1246 (1993); State v. Fryou, 244 N.C. App. 112, 780 S.E.2d 152 (2015); West Two Rivers Ranch v. Pennington County, 1996 SD 70, 549 N.W.2d 683 (S.D. 1996).
11 People v. Campbell, 92 Misc. 2d 732, 401 N.Y.S.2d 152 (N.Y. City Crim. Ct. 1978).
12 Foster Trading Corp. v. Luckett, 303 S.W.2d 315 (Ky. 1957).
13 Ayres v. Townsend, 324 Md. 666, 598 A.2d 470 (1991); State v. Johnson, 2019-Ohio-5386, 139 N.E.3d 963 (Ohio Ct. App. 3d Dist. Allen County 2019).
14 State v. Douglas, 117 Vt. 484, 94 A.2d 403 (1953).

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

6. Burden, Quantum, and Sufficiency of Proof

§ 192. Quantum of proof in constitutional challenge to legislation; proof showing "clear," "palpable," or "manifest" violation of constitution
—Proof showing unconstitutionality beyond a reasonable doubt

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1004, 1030 to 1040

Some courts hold that a party asserting that a particular statute violates constitutional provisions assumes the burden of establishing that assertion beyond a reasonable doubt.¹ Thus, courts should not pronounce legislation to be contrary to the constitution in doubtful cases.²

CUMULATIVE SUPPLEMENT

Cases:

Party challenging the constitutionality of statute bears burden of proving that it is unconstitutional beyond a reasonable doubt, and if any doubt exists, it must be resolved in favor of statute. [State v. Sedler, 2020 MT 248, 473 P.3d 406 \(Mont. 2020\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 Simpson v. Cotton Creek Circles, LLC, 181 P.3d 252 (Colo. 2008); Dutkiewicz v. Dutkiewicz, 289 Conn. 362, 957 A.2d 821 (2008); State v. Mendoza, 82 Haw. 143, 920 P.2d 357 (1996); State v. Newton, 929 N.W.2d 250 (Iowa 2019); In re Conservatorship of Foster, 547 N.W.2d 81 (Minn. 1996); State v. Watkins, 676 So. 2d 247 (Miss. 1996); State v. Yang, 2019 MT 266, 397 Mont. 486, 452 P.3d 897 (2019); Miller v. Burk, 124 Nev. 56, 188 P.3d 1112 (2008) (voter initiative); State v. Muhammad, 145 N.J. 23, 678 A.2d 164 (1996); State v. Smith, 145 N.M. 757, 2009-NMCA-028, 204 P.3d 1267 (Ct. App. 2008); Pringle v. Wolfe, 88 N.Y.2d 426, 646 N.Y.S.2d 82, 668 N.E.2d 1376 (1996); Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991); State v. Blue, 2018 ND 171, 915 N.W.2d 122 (N.D. 2018); In re Craig, 545 N.W.2d 764 (N.D. 1996); Columbia Gas Transm. Corp. v. Levin, 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400 (2008); State v. Fonseca, 670 A.2d 1237 (R.I. 1996); In re Lasure, 379 S.C. 144, 666 S.E.2d 228 (2008); State v. Berget, 2014 SD 61, 853 N.W.2d 45 (S.D. 2014); Green v. Siegel, Barnett & Schutz, 1996 SD 146, 557 N.W.2d 396 (S.D. 1996); State v. Reynolds, 457 P.3d 474 (Wash. Ct. App. Div. 2 2020); In re A.W., 182 Wash. 2d 689, 344 P.3d 1186 (2015); State v. Bryan, 145 Wash. App. 353, 185 P.3d 1230 (Div. 1 2008); State v. Yocom, 233 W. Va. 439, 759 S.E.2d 182 (2014); State ex rel. Lambert v. County Com'n of Boone County, 192 W. Va. 448, 452 S.E.2d 906 (1994); State v. Hall, 207 Wis. 2d 54, 557 N.W.2d 778 (1997); In Interest of NJC, 913 P.2d 435 (Wyo. 1996).
- 2 U.S. v. Butler, 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914 (1936); Department of Finance v. Dishman, 298 Ky. 545, 183 S.W.2d 540, 155 A.L.R. 1429 (1944); Brumley v. Baxter, 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930 (1945); Great Northern Ry. Co. v. Graff, 71 S.D. 595, 28 N.W.2d 77 (1947); City of Madison v. Chicago, M., St. P. & P. Ry. Co., 2 Wis. 2d 467, 87 N.W.2d 251 (1958).

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V. Determination of Constitutionality of Legislation

C. Establishing Constitutionality

6. Burden, Quantum, and Sufficiency of Proof

§ 193. Quantum of proof in constitutional challenge to legislation; proof showing "clear," "palpable," or "manifest" violation of constitution—Proof showing irreconcilable conflict with constitution

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1030 to 1040

If a law adopted by Congress conflicts with the Federal Constitution, then the Constitution must govern,¹ and where there is a conflict between a statute and a state constitution, the state constitution overrides the statute.² Some courts have held that in instances where such conflicts are found, however, courts will exercise their power to invalidate legislation on constitutional grounds only where the conflict between the statute and the constitution is clear and irreconcilable.³ In other words, the court is without authority to declare a statute unconstitutional unless it is in positive or direct conflict with the constitution⁴ or manifestly in contravention of the constitution.⁵

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Footnotes

¹ [In re Hodge](#), 200 B.R. 884 (Bankr. D. Idaho 1996), decision rev'd on other grounds, [220 B.R. 386](#) (D. Idaho 1998).

² [Anton v. South Carolina Coastal Council](#), 321 S.C. 481, 469 S.E.2d 604 (1996).

³ [Cap F. Bourland Ice Co. v. Franklin Utilities Co.](#), 180 Ark. 770, 22 S.W.2d 993, 68 A.L.R. 1018 (1929); [Lynn v. Nichols](#), 122 Misc. 170, 202 N.Y.S. 401 (Sup 1923), aff'd, 210 A.D. 812, 205 N.Y.S. 935 (4th Dep't

1924); *State v. Moorer*, 152 S.C. 455, 150 S.E. 269 (1929); *State ex rel. Reuss v. Giessel*, 260 Wis. 524, 51 N.W.2d 547 (1952).

4 *State v. McGillicuddy*, 646 A.2d 354 (Me. 1994); *People v. Jose L.*, 99 Misc. 2d 922, 417 N.Y.S.2d 655 (N.Y. City Crim. Ct. 1979); *Ohio Public Interest Action Group, Inc. v. Public Utilities Commission*, 43 Ohio St. 2d 175, 72 Ohio Op. 2d 98, 331 N.E.2d 730 (1975).

5 *State v. Crouser*, 81 Haw. 5, 911 P.2d 725 (1996); *Schwegmann Bros. v. Louisiana Bd. of Alcoholic Beverage Control*, 216 La. 148, 43 So. 2d 248, 14 A.L.R.2d 680 (1949); *Liddell v. Heavner*, 2008 OK 6, 180 P.3d 1191 (Okla. 2008).

16A Am. Jur. 2d Constitutional Law § 194

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

1. Total Unconstitutionality

§ 194. Effect of determination of total unconstitutionality of legislation

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1045 to 1047

West's Key Number Digest, [Statutes](#) 1530, 1531

The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law¹ but is wholly void² and ineffective for any purpose.³ Since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it,⁴ an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed⁵ and never existed;⁶ that is, it is void ab initio.⁷ Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.⁸

Since an unconstitutional law is void, it follows that generally the statute imposes no duties,⁹ confers no rights,¹⁰ creates no office¹¹ or liabilities,¹² bestows no power or authority on anyone,¹³ affords no protection,¹⁴ is incapable of creating any rights or obligations,¹⁵ does not allow for the granting of any relief,¹⁶ and justifies no acts performed under it.¹⁷

Once a statute is determined to be unconstitutional, it invalidates the law in its entirety,¹⁸ and no private citizen or division of the state may take any further action pursuant to its provisions.¹⁹ A statute is rendered completely inoperative if it is declared facially unconstitutional.²⁰ A contract that rests on an unconstitutional statute creates no obligation to be impaired by subsequent legislation.²¹ No one is bound to obey an unconstitutional law,²² and no courts are bound to enforce it.²³ A law contrary to the United States Constitution may not be enforced.²⁴ Once a statute has been declared unconstitutional, courts thereafter have no

jurisdiction over alleged violations.²⁵ Upon a statute being declared unconstitutional on its face, convictions based thereon are void,²⁶ and persons convicted and fined under a statute subsequently held unconstitutional may recover the fines paid.²⁷

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Footnotes

- 1 Commissioners of Roads and Revenues of Fulton County v. Davis, 213 Ga. 792, 102 S.E.2d 180 (1958); State v. Village of Garden City, 74 Idaho 513, 265 P.2d 328 (1953); McGuire v. C & L Restaurant Inc., 346 N.W.2d 605 (Minn. 1984); People v. Corley, 91 Misc. 2d 255, 397 N.Y.S.2d 875 (N.Y. City Crim. Ct. 1977).
- 2 Lewis v. Uselton, 224 Ga. App. 428, 480 S.E.2d 856 (1997); In re N.G., 2018 IL 121939, 425 Ill. Dec. 547, 115 N.E.3d 102 (Ill. 2018); State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995); State v. Clark, 367 N.W.2d 168 (N.D. 1985); St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 1989 OK 139, 782 P.2d 915 (Okla. 1989); Weegar v. Bakeberg, 527 N.W.2d 676 (S.D. 1995); Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955).
- 3 Legislative Research Com'n v. Fischer, 366 S.W.3d 905 (Ky. 2012); State v. One Oldsmobile Two-Door Sedan, Model 1946, 227 Minn. 280, 35 N.W.2d 525 (1948); Grieb v. Department of Liquor Control of State, 153 Ohio St. 77, 41 Ohio Op. 148, 90 N.E.2d 691 (1950); Hunter v. School Dist. of Gale-Ettrick-Trempealeau, 97 Wis. 2d 435, 293 N.W.2d 515 (1980).
- 4 Shirley v. Getty Oil Co., 367 So. 2d 1388 (Ala. 1979); Oliver v. State, 619 So. 2d 384 (Fla. 1st DCA 1993); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 691 S.E.2d 218 (2010); Legislative Research Com'n v. Fischer, 366 S.W.3d 905 (Ky. 2012); Trout v. State, 231 S.W.3d 140 (Mo. 2007).
- 5 New Mexico Health Connections v. United States Department of Health and Human Services, 340 F. Supp. 3d 1112 (D.N.M. 2018); Huffman v. Dawkins, 273 Ark. 520, 622 S.W.2d 159 (1981); Commissioners of Roads and Revenues of Fulton County v. Davis, 213 Ga. 792, 102 S.E.2d 180 (1958); Briggs v. Campbell, Wyant & Cannon Foundry Co., Division Textron Am. Inc., 2 Mich. App. 204, 139 N.W.2d 336 (1966), judgment aff'd, 379 Mich. 160, 150 N.W.2d 752 (1967); McGuire v. C & L Restaurant Inc., 346 N.W.2d 605 (Minn. 1984); State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995); State v. Clark, 367 N.W.2d 168 (N.D. 1985); St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 1989 OK 139, 782 P.2d 915 (Okla. 1989); Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Tp., 589 Pa. 135, 907 A.2d 1033 (2006); Franks v. State, 772 S.W.2d 428 (Tenn. 1989); State v. Doyal, 589 S.W.3d 136 (Tex. Crim. App. 2019); School Districts' Alliance for Adequate Funding of Special Educ. v. State, 149 Wash. App. 241, 202 P.3d 990, 242 Ed. Law Rep. 383 (Div. 2 2009), aff'd, 170 Wash. 2d 599, 244 P.3d 1, 262 Ed. Law Rep. 1004 (2010); City of Fairmont v. Pirolo Pontiac-Cadillac Co., 172 W. Va. 505, 308 S.E.2d 527 (1983).
- 6 Humienny v. Government of Virgin Islands, 62 V.I. 735, 79 F. Supp. 3d 548 (D.V.I. 2015); Thomas v. North Carolina Dept. of Human Resources, 124 N.C. App. 698, 478 S.E.2d 816 (1996), aff'd, 346 N.C. 268, 485 S.E.2d 295 (1997); Weegar v. Bakeberg, 527 N.W.2d 676 (S.D. 1995).
- 7 In re N.G., 2018 IL 121939, 425 Ill. Dec. 547, 115 N.E.3d 102 (Ill. 2018); People v. Manuel, 94 Ill. 2d 242, 68 Ill. Dec. 506, 446 N.E.2d 240 (1983); Legislative Research Com'n v. Fischer, 366 S.W.3d 905 (Ky. 2012); Lovgren v. Peoples Elec. Co., Inc., 380 N.W.2d 791 (Minn. 1986); Nevada Power Co. v. Metropolitan Development Co., 104 Nev. 684, 765 P.2d 1162 (1988); Town of Islip v. Paliotti, 196 A.D.2d 648, 601 N.Y.S.2d 926 (2d Dep't 1993); Prickett v. North Carolina Office of State Human Resources, 836 S.E.2d 773 (N.C. Ct. App. 2019).
- 8 Commissioners of Roads and Revenues of Fulton County v. Davis, 213 Ga. 792, 102 S.E.2d 180 (1958).
- 9 Flournoy v. First Nat. Bank of Shreveport, 197 La. 1067, 3 So. 2d 244 (1941); State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995); Franks v. State, 772 S.W.2d 428 (Tenn. 1989).
- 10 People v. Harvey, 379 Ill. App. 3d 518, 318 Ill. Dec. 756, 884 N.E.2d 724 (1st Dist. 2008); State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995); Nevada Power Co. v. Metropolitan Development Co., 104 Nev. 684, 765 P.2d 1162 (1988); Ethics Com'n of State of Okl. v. Cullison, 1993 OK 37, 850 P.2d 1069 (Okla. 1993); General Motors Corp. v. Oklahoma County Bd. of Equalization, 1983 OK 59, 678 P.2d 233 (Okla. 1983); Franks v. State, 772 S.W.2d 428 (Tenn. 1989); Geeslin v. State Farm Lloyds, 255 S.W.3d 786 (Tex. App. Austin 2008).

As to the effect of and rights under a judgment based upon an unconstitutional law, see [Am. Jur. 2d, Judgments](#) § 14.

As to the res judicata effect of a judgment based upon an unconstitutional law, see [Am. Jur. 2d, Judgments](#) § 712.

11 Flournoy v. First Nat. Bank of Shreveport, 197 La. 1067, 3 So. 2d 244 (1941); Franks v. State, 772 S.W.2d 428 (Tenn. 1989).

12 Liddell v. Heavner, 2008 OK 6, 180 P.3d 1191 (Okla. 2008).

13 Flournoy v. First Nat. Bank of Shreveport, 197 La. 1067, 3 So. 2d 244 (1941).

14 Nevada Power Co. v. Metropolitan Development Co., 104 Nev. 684, 765 P.2d 1162 (1988); Ethics Com'n of State of Okl. v. Cullison, 1993 OK 37, 850 P.2d 1069 (Okla. 1993); Franks v. State, 772 S.W.2d 428 (Tenn. 1989).

15 As to the limitations to which this rule is subject, see [§ 195](#).

16 State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995).

17 Helvey v. Dawson County Bd. of Equalization, 242 Neb. 379, 495 N.W.2d 261 (1993) (a court may not grant any relief based upon a statute which is nonexistent or a statute which has become nonexistent by reason of a judicial declaration of unconstitutionality).

Millet v. Rizzo, 2 So. 2d 244 (La. Ct. App. 1st Cir. 1941); Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953); State ex rel. Tharel v. Board of Com'r's of Creek County, 1940 OK 468, 188 Okla. 184, 107 P.2d 542 (1940).

18 As to the effect of a declaration of unconstitutionality on acts performed under it, generally, see [§ 195](#).

19 List v. Ohio Elections Com'n, 45 F. Supp. 3d 765 (S.D. Ohio 2014), aff'd, 814 F.3d 466 (6th Cir. 2016).

Thomas v. North Carolina Dept. of Human Resources, 124 N.C. App. 698, 478 S.E.2d 816 (1996), aff'd, 346 N.C. 268, 485 S.E.2d 295 (1997).

20 Lummi Indian Nation v. State, 170 Wash. 2d 247, 241 P.3d 1220 (2010).

21 Citrus Memorial Health Foundation, Inc. v. Citrus County Hosp. Bd., 108 So. 3d 675 (Fla. 1st DCA 2013), decision aff'd, 150 So. 3d 1102 (Fla. 2014); Jones v. Columbian Carbon Co., 132 W. Va. 219, 51 S.E.2d 790 (1948).

22 Flournoy v. First Nat. Bank of Shreveport, 197 La. 1067, 3 So. 2d 244 (1941); Amyot v. Caron, 88 N.H. 394, 190 A. 134 (1937).

23 Chicago, I. & L.R. Co. v. Hackett, 228 U.S. 559, 33 S. Ct. 581, 57 L. Ed. 966 (1913); Schickel v. Dilger, 925 F.3d 858 (6th Cir. 2019), cert. denied, 140 S. Ct. 649, 205 L. Ed. 2d 388 (2019); Payne v. Griffin, 51 F. Supp. 588 (M.D. Ga. 1943); Flournoy v. First Nat. Bank of Shreveport, 197 La. 1067, 3 So. 2d 244 (1941); City of Missoula v. Mountain Water Company, 2018 MT 139, 391 Mont. 422, 419 P.3d 685 (2018), as corrected, (June 8, 2018).

24 Painter v. Shalala, 97 F.3d 1351 (10th Cir. 1996); Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987), opinion reinstated on reconsideration, 824 F.2d 1240 (D.C. Cir. 1987).

A federal law passed in violation of the Constitution's procedural requirements may be void ab initio. [Close v. Sotheby's, Inc.](#), 909 F.3d 1204 (9th Cir. 2018), cert. denied, 139 S. Ct. 1469, 203 L. Ed. 2d 684 (2019).

25 U.S. v. Baucum, 80 F.3d 539 (D.C. Cir. 1996).

26 Saunders v. Commonwealth, 62 Va. App. 793, 753 S.E.2d 602 (2014), judgment aff'd, 2015 WL 10945236 (Va. 2015).

27 Neely v. U.S., 546 F.2d 1059, 41 A.L.R. Fed. 331 (3d Cir. 1976).

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

1. Total Unconstitutionality

§ 195. Protection of rights as exception to rule against enforceability of unconstitutional legislation

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1045 to 1047

West's Key Number Digest, [Statutes](#) 1530, 1531

Though a statute declared unconstitutional is unenforceable,¹ it is not wholly without effect; the existence of the statute prior to that declaration is an operative fact and may have consequences that cannot justly be ignored.² The general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted; however, exceptions may be made to this general rule where, because of the nature of the statute and its previous application, unjust results would accrue to those who justifiably relied on it.³ When a statute that has been in effect for some time is declared unconstitutional, questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, and of public policy in the light of the nature both of the statute and of its previous application demand examination.⁴ Thus, an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified,⁵ and courts, depending on the circumstances, have employed other rules that avoid the hard and fast consequences of such a rule.⁶ To put it another way, courts may make exceptions to the general rule where, because of the nature of the statute and its previous application, unjust results would accrue to those who justifiably relied on it.⁷

For instance, when an invalid statute involves the compulsion of statutory duties by public officials and those officials rely on the well-known presumptive validity of statutes, a court may make a ruling on the statute prospective in effect only.⁸ More specifically, a declaration of a law's constitutional invalidity should not be applied so as to work a hardship or impose liability

upon a public official or a private citizen who has acted in good faith and relied on the statute's validity before a court has declared it invalid or before another proper official has given notice that the statute fails to conform to the fundamental law. When an invalid statute calls for a compulsory discharge of statutory duties by public officials who rely on the presumptive validity of statutes, the court may give its pronouncement purely prospective effect.⁹

Also, the position has occasionally been taken, as far as omissions to perform some duty are concerned, that reliance on a statute that is subsequently held to be unconstitutional protects from civil or criminal liability one who omits an act which, but for the statute, would be required by law.¹⁰ And reliance on a statute subsequently declared unconstitutional may properly be considered by the jury on the issue of damages in a civil action against the one who relied upon the statute.¹¹

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Footnotes

- 1 As to such unenforceability, generally, see § 194.
- 2 *Com. v. Gagnon*, 387 Mass. 768, 443 N.E.2d 407 (1982).
- 3 *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (2010).
- 4 *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940).
- 5 *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940).
- 6 *American Mfrs. Mut. Ins. Co. v. Ingram*, 301 N.C. 138, 271 S.E.2d 46 (1980).
- 7 *Sentence Review Panel v. Moseley*, 284 Ga. 128, 663 S.E.2d 679 (2008).
- 8 *Ethics Com'n of State of Okl. v. Cullison*, 1993 OK 37, 850 P.2d 1069 (Okla. 1993).
- 9 *Liddell v. Heavner*, 2008 OK 6, 180 P.3d 1191 (Okla. 2008).
- 10 *Texas Co. v. State*, 31 Ariz. 485, 254 P. 1060, 53 A.L.R. 258 (1927).
- 11 *Flemming v. South Carolina Elec. & Gas Co.*, 239 F.2d 277 (4th Cir. 1956).

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16A Am. Jur. 2d Constitutional Law § 196

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

1. Total Unconstitutionality

§ 196. Validation of unconstitutional legislation by amendment of statute

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1045 to 1047

West's Key Number Digest, [Statutes](#) 1530, 1531

It has been broadly stated that an unconstitutional act cannot be validated by the legislature¹ and that a statute declared unconstitutional is deemed void from its inception and is not revived merely because the constitutional infirmity is subsequently eliminated.² Once a statute is declared unconstitutional and void, it cannot be saved by a subsequent statutory amendment, as there is, in legal contemplation, nothing to amend, and the same rule applies to ordinances.³ Moreover, it is axiomatic that an act in violation of the provisions of the organic law may not be validated by popular vote; for example, an unconstitutional act relating to road improvements cannot be made lawful by a vote in favor of it by the people to be affected by it,⁴ apart from any amendment to the constitution.⁵

There are limitations on these rules, however. Although a legislative enactment may be invalid merely because certain limiting language in it makes it repugnant to constitutional limitations, a court cannot cure such an invalidity merely by striking the limiting language where the elimination of that language would substantially extend the operation of the enactment beyond the scope contemplated by all of its language.⁶ Likewise, at least insofar as its future operation is concerned, such a statute may be amended so as to make it a constitutional one by removing its objectionable provisions, or by supplying others, to conform it to the requirements of the constitution.⁷

A statute once declared unconstitutional and later held to be constitutional⁸ does not require reenactment by the legislature to restore its operative force.⁹ Rights acquired under the particular adjudications holding the statute invalid are not affected by the subsequent decision that the statute is constitutional.¹⁰

Observation:

The question sometimes arises whether a constitutional statute may subsequently be amended by an unconstitutional one. An unconstitutional act that purports to amend a prior constitutional statute cannot accomplish that objective, and the unconstitutional act, having no effect, can amend nothing;¹¹ instead, the applicable law is provided by the statute as worded prior to the unconstitutional amendment.¹²

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Footnotes

- 1 Williams v. Dormany, 99 Fla. 496, 126 So. 117 (1930); Thomas v. State, ex rel. Gilbert, 76 Ohio St. 341, 81 N.E. 437 (1907); Atkinson v. Southern Exp. Co., 94 S.C. 444, 78 S.E. 516 (1913).
- 2 Gilbert v. Richardson, 264 Ga. 744, 452 S.E.2d 476 (1994).
- 3 Maxim Cabaret, Inc. v. City of Sandy Springs, 304 Ga. 187, 816 S.E.2d 31 (2018).
- 4 Hixson v. Burson, 54 Ohio St. 470, 43 N.E. 1000 (1896).
- 5 § 197.
- 6 Allied Stores of Ohio, Inc. v. Bowers, 166 Ohio St. 116, 1 Ohio Op. 2d 342, 140 N.E.2d 411 (1957), judgment aff'd, 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480, 82 Ohio L. Abs. 312 (1959).
- 7 Magnolia Petroleum Co. v. Carter Oil Co., 218 F.2d 1 (10th Cir. 1954); State ex rel. Badgett v. Lee, 156 Fla. 291, 22 So. 2d 804 (1945); Commissioners of Roads and Revenues of Fulton County v. Davis, 213 Ga. 792, 102 S.E.2d 180 (1958); Oklahoma Natural Gas Co. v. State ex rel. Vassar, 1940 OK 137, 187 Okla. 164, 101 P.2d 793 (1940).
- 8 State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451, 82 S. Ct. 1380, 8 L. Ed. 2d 620 (1962) (the Supreme Court of the United States has freedom to change its decision on the constitutionality of laws).
- 9 Jawish v. Morlet, 86 A.2d 96 (Mun. Ct. App. D.C. 1952).
- 10 State v. White, 194 So. 2d 601 (Fla. 1967).
- 11 Maxim Cabaret, Inc. v. City of Sandy Springs, 304 Ga. 187, 816 S.E.2d 31 (2018).
- 12 Louisiana Republican Party v. Foster, 674 So. 2d 225 (La. 1996).

16A Am. Jur. 2d Constitutional Law § 197

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Constitutional Law

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

1. Total Unconstitutionality

§ 197. Validation of unconstitutional legislation by amendment of constitution

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1045 to 1047

West's Key Number Digest, [Statutes](#) 1530, 1531

Various principles are applicable to the question whether an unconstitutional statute may be validated by amendment of the governing constitution rather than by amendment of the statute itself.¹ Implied validation is generally used to validate an invalid statute by passing a constitutional amendment that cures the constitutional infirmity.² An unconstitutional statute has been held not validated by a subsequent constitutional amendment that does not ratify and confirm the statute but merely authorizes the enactment of such a statute.³ Where the constitutional amendment does not expressly ratify and confirm the statute, the statute must be reenacted.⁴

However, in other jurisdictions the view has been taken that a constitutional amendment, even without express language of ratification, may have the effect of ratifying as of their respective dates legislative acts that have been declared void as inconsistent with the constitution prior to such amendment.⁵ In the case of a constitutional amendment having a prospective effect, a statute antedating the amendment and in violation of it may be consolidated and recodified and, as consolidated and recodified, be constitutional.⁶

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Footnotes

- 1 As to the latter method, see § 196.
- 2 [Egbert v. Nissan Motor Co., Ltd.](#), 2010 UT 8, 228 P.3d 737 (Utah 2010).
- 3 Trustees of Phillips Exeter Academy v. Exeter, 90 N.H. 472, 27 A.2d 569 (1940); [Fellows v. Shultz](#), 1970-NMSC-071, 81 N.M. 496, 469 P.2d 141 (1970).
- 4 [Armco Steel v. City of Kansas City, Mo.](#), 883 S.W.2d 3 (Mo. 1994).
- 5 State ex rel. Hoffman v. Powell, 118 Fla. 296, 159 So. 508 (1935); [Hammond v. Clark](#), 136 Ga. 313, 71 S.E. 479 (1911); [Fontenot v. Young](#), 128 La. 20, 54 So. 408 (1911) (where a statute attacked as unconstitutional is ratified and affirmed by a constitutional amendment, there remains no basis for further constitutional attack).
- 6 [Robinson v. Broome County](#), 276 A.D. 69, 93 N.Y.S.2d 662 (3d Dep't 1949), judgment aff'd, 301 N.Y. 524, 93 N.E.2d 77 (1950).

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16A Am. Jur. 2d Constitutional Law § 198

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

a. Rule of Severability; in General

§ 198. Rule of severability for partially unconstitutional statutes

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1046

West's Key Number Digest, [Statutes](#) 1533

Treatises and Practice Aids

As to separability, generally, see Sutherland Statutes and Statutory Construction, Separability [[Westlaw® Search Query](#)]

Although there are no degrees of constitutionality, so that an act is either constitutional or unconstitutional,¹ a statute can still be constitutional in one part and unconstitutional in another.² If parts of the same statute are wholly independent of each other, those which are constitutional may stand while those which are unconstitutional will be rejected.³ Thus, whether or not the infirmity that avoids a part of a statute affects the entire act depends upon whether the constitutional and unconstitutional provisions are interdependent or inseparably connected.⁴

Whenever a statute contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of the Court so to declare and to maintain the act insofar as it is valid.⁵ When deciding whether an unconstitutional portion of a statute

can be severed and the nonoffending portions left intact, the Court attempts to retain as much of the original statute as possible while striking the portions that render the statute unconstitutional.⁶ Generally speaking, when confronting a constitutional flaw in a statute, the Supreme Court tries to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.⁷ In that situation, a court should refrain from invalidating more of a statute than is necessary.⁸ In some cases of partial invalidity, a narrowing interpretation of a statute will save it from unconstitutionality.⁹ If such an interpretation is not possible, and if the invalid part is severable from the rest, the portion that is constitutional may stand while that which is unconstitutional is "stricken out"¹⁰ and rejected.¹¹ When the unconstitutional portion of a statute is eliminated, if the remainder is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained.¹² The obverse of the rule is also firmly settled: where it is not possible to separate that part of an act that is unconstitutional from the rest of the act, the whole statute must fall.¹³ This principle of severability is sometimes referred to as the doctrine of elision.¹⁴ Generally speaking, unless otherwise specified, the individual provisions of all statutes are presumptively severable.¹⁵

Observation:

Under the Uniform Statute & Rule Construction Act (USRCA), if a provision of a statute or rule or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute or rule which can be given effect without the invalid provision or application, and to this end the provisions of the statute or rule are severable.¹⁶

As to the methodology and scope of the severability rule, there is nothing in the rule that prevents the severance and elimination not only of words, clauses, or sentences but also of whole sections of laws.¹⁷ Also, it has been recognized that a preamble of an act may be severed from the rest of a statute.¹⁸ The severability rule applies with the same force to county and city ordinances and city charters as to legislative acts, generally.¹⁹ The severability of a state statute is a state, not a federal, question.²⁰ Accordingly, if state interpretations exist, they will be followed; if no construction by a state court is available, the United States Supreme Court ordinarily will remand the case to the state courts for construction.²¹

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Footnotes

- 1 City of St. Petersburg v. Pfeiffer, 52 So. 2d 796 (Fla. 1951).
- 2 Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946); People ex rel. Chicago Bar Ass'n v. State Bd. of Elections, 136 Ill. 2d 513, 146 Ill. Dec. 126, 558 N.E.2d 89 (1990); Thayer v. South Carolina Tax Com'n, 307 S.C. 6, 413 S.E.2d 810 (1992).
- 3 Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985); Vivid Entertainment, LLC v. Fielding, 774 F.3d 566 (9th Cir. 2014); Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013); State v. Dugan, 2013 MT 38, 369 Mont. 39, 303 P.3d 755 (2013).
- 4 Dade County v. Keyes, 141 So. 2d 819 (Fla. 3d DCA 1962).

- 5 Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987); Phantom Ventures
LLC v. DePriest, 240 F. Supp. 3d 239 (D. Mass. 2017).
6 Florida law favors severance of a law's invalid portions from valid ones where possible. *Jones v. Governor
of Florida*, 950 F.3d 795 (11th Cir. 2020).
7 State v. Melchert-Dinkel, 844 N.W.2d 13, 96 A.L.R.6th 755 (Minn. 2014).
8 Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed.
2d 706 (2010).
9 Collateral Loanbrokers Association of New York, Inc. v. City of New York, 178 A.D.3d 598, 2019 WL
7173954 (1st Dep't 2019); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 107 S. Ct. 1476, 94 L. Ed. 2d 661
(1987).
10 State v. Thiel, 183 Wis. 2d 505, 515 N.W.2d 847 (1994).
11 As to a narrowing construction, generally, see § 176.
12 State Compensation Fund v. Symington, 174 Ariz. 188, 848 P.2d 273 (1993); Cunningham v. State, 260
Ga. 827, 400 S.E.2d 916 (1991); State v. Bloss, 62 Haw. 147, 613 P.2d 354 (1980); Whitaker v. City of
Springfield, 889 S.W.2d 869 (Mo. Ct. App. S.D. 1994); State v. Items of Real Property Owned and/or
Possessed by Chilinski, 2016 MT 280, 385 Mont. 249, 383 P.3d 236 (2016).
13 Cox v. Cache County, 18 F. Supp. 3d 1251 (D. Utah 2014); State Compensation Fund v. Symington, 174
Ariz. 188, 848 P.2d 273 (1993); State v. Hurliman, 143 Conn. 502, 123 A.2d 767 (1956); Greenblatt v.
Goldin, 94 So. 2d 355, 59 A.L.R.2d 877 (Fla. 1957); Louisiana Associated General Contractors, Inc. v. State
Through Div. of Admin., Office of State Purchasing, 669 So. 2d 1185 (La. 1996); Millsap v. Quinn, 785
S.W.2d 82 (Mo. 1990); Binegar v. Eighth Judicial Dist. Court In and For County of Clark, 112 Nev. 544,
915 P.2d 889 (1996); Castle v. Gladden, 201 Or. 353, 270 P.2d 675 (1954); State v. Heston, 137 W. Va. 375,
71 S.E.2d 481 (1952).
14 Sonneman v. Hickel, 836 P.2d 936 (Alaska 1992); Home Builders Assn. of Dayton & Miami Valley v.
Lebanon, 167 Ohio App. 3d 247, 2006-Ohio-595, 854 N.E.2d 1097 (12th Dist. Warren County 2006); Thayer
v. South Carolina Tax Com'n, 307 S.C. 6, 413 S.E.2d 810 (1992).
15 American Federation of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145, 160 A.L.R. 873 (1944); Greenblatt
v. Goldin, 94 So. 2d 355, 59 A.L.R.2d 877 (Fla. 1957); Ricks v. Close, 201 La. 242, 9 So. 2d 534 (1942);
Lane Distributors v. Tilton, 7 N.J. 349, 81 A.2d 786 (1951); State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128
A.L.R. 658 (1940); Board of Elections for Franklin County v. State ex rel. Schneider, 128 Ohio St. 273, 191
N.E. 115, 97 A.L.R. 1417 (1934); Mendiola v. Graham, 139 Or. 592, 10 P.2d 911 (1932); Smith v. Carbon
County, 95 Utah 340, 81 P.2d 370 (1938).
16 State v. Crank, 468 S.W.3d 15 (Tenn. 2015).
17 Com. v. Hopkins, 632 Pa. 36, 117 A.3d 247 (2015).
18 ULA Statute & Rule Construct § 9.
19 Dakota Rural Action v. Noem, 416 F. Supp. 3d 874 (D.S.D. 2019); Murphy v. Commissioner of Dept. of
Indus. Accidents, 418 Mass. 165, 635 N.E.2d 1180 (1994) (there is no general rule that only entire sentences
may be separated from otherwise valid statutes for preserving the constitutionality of the remainder; in
appropriate circumstances, individual words may be struck).
20 State v. Ehr, 57 N.D. 310, 221 N.W. 883 (1928).
21 City of Miami v. Kayfetz, 92 So. 2d 798 (Fla. 1957); Patton v. City of Springfield, 14 Ohio Op. 2d 165, 85
Ohio L. Abs. 37, 170 N.E.2d 873 (C.P. 1960).
22 Bell v. State of Md., 378 U.S. 226, 84 S. Ct. 1814, 12 L. Ed. 2d 822 (1964); Chaplinsky v. State of New
Hampshire, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).
23 Dorchy v. State of Kansas, 264 U.S. 286, 44 S. Ct. 323, 68 L. Ed. 686 (1924).

16A Am. Jur. 2d Constitutional Law § 199

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Constitutional Law

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

a. Rule of Severability; in General

§ 199. Application of rule of severability for partially unconstitutional statutes; tests for severability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1046

West's Key Number Digest, [Statutes](#) 1533

The question whether the rule of severability should be applied to save partially unconstitutional legislation from being struck down in toto fundamentally involves a determination of and conformity with the intent of the body that enacted the legislation.¹ For determining legislative intent in this situation, several tests or formulae of severability—one often overlapping partly with another—have been developed. Thus, it is held that, unless it is evident that the legislature would not have enacted those provisions that are within its power, independently of the part which is not, the invalid part may be dropped if what is left is fully operative as a law.² Pursuant to the Supreme Court's general approach to severability, the Court ordinarily gives effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law, and so long as it is not evident from the statutory text and context that Congress would have preferred no statute at all.³ In conducting the severability analysis when federal statutory provisions in an act are found unconstitutional, the Court asks whether the law remains fully operative without the invalid provisions, but the Court cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole.⁴ It is also said that if, after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose, it does not necessarily follow that the whole act is void, and effect may be given to the remaining portions.⁵

A third test is that the constitutional and unconstitutional parts should be so severable that the valid portion may be read and may stand by itself.⁶ Another formula for severability is that a court must determine (1) whether the constitutional and unconstitutional portions are capable of separation so that each may be read and may stand by itself, (2) whether the unconstitutional portion is so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislative body if the portion is stricken out, and (3) whether the insertion of words or terms is necessary in order to separate the constitutional portion from the unconstitutional portion and to only give effect to the former.⁷ Yet another formulation is whether the constitutional portion of a statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed that Congress or the state legislature would have passed it independently of that which is in conflict with the Constitution.⁸

Severing unconstitutional provisions is permissible unless the court concludes that one of two exceptions applies: first, a statute cannot be severed if the court determines that the valid provisions are so essentially and inseparably connected with, and so dependent upon, the void provisions that the legislature would not have enacted the valid provisions without the voided language, and second, the court is not to sever a statute if the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.⁹ Severance of an unconstitutional provision of a statute is inappropriate if the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.¹⁰

A general rule applying to all of these tests is that in order for the unconstitutional portion of a statute to be separable from the constitutional portions, the invalid provision must be grammatically, functionally, and volitionally separable.¹¹ A statute is grammatically separable if it is distinct and separate and, hence, can be removed as a whole without affecting the wording of any of the measure's other provisions; it is functionally separable if it is not necessary to the measure's operation and purpose; and it is volitionally separable if it is not of critical importance to the measure's enactment.¹²

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Footnotes

1 § 203.

2 *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987); *United States v. Smith*, 945 F.3d 729 (2d Cir. 2019); *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), as revised, (Jan. 9, 2020).

3 *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 134 S. Ct. 2165, 189 L. Ed. 2d 83 (2014).

4 *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 200 L. Ed. 2d 854 (2018).

The "severability doctrine," recognizing the Court's duty to uphold the constitutionality of legislative enactments, has only been used to strike objectionable language; it is not a vehicle for the wholesale substitution of other language for language that is stricken. *Florida Dept. of State v. Mangat*, 43 So. 3d 642 (Fla. 2010).

5 *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985).

6 *Davidson Bldg. Co. v. Mulock*, 212 Iowa 730, 235 N.W. 45 (1931); *Louisiana Associated General Contractors, Inc. v. State Through Div. of Admin., Office of State Purchasing*, 669 So. 2d 1185 (La. 1996); *City Bank Farmers' Trust Co. v. New York Cent. R. Co.*, 253 N.Y. 49, 170 N.E. 489, 69 A.L.R. 940 (1930); *Matter of Certification of Questions of Law from U.S. Court of Appeals for Eighth Circuit, Pursuant to Provisions of SDCL 15-24A-1*, 1996 SD 10, 544 N.W.2d 183 (S.D. 1996).

7 *Home Builders Assn. of Dayton & Miami Valley v. Lebanon*, 167 Ohio App. 3d 247, 2006-Ohio-595, 854 N.E.2d 1097 (12th Dist. Warren County 2006); *Lamar Advantage GP Co., LLC v. City of Cincinnati*, 114 N.E.3d 805 (Ohio C.P. 2018), subsequent determination, 114 N.E.3d 831 (Ohio C.P. 2018).

8 *Environmental Technology Council v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996); *Board of Natural Resources of State of Wash. v. Brown*, 992 F.2d 937 (9th Cir. 1993); *Brady v. State*, 575 N.E.2d 981 (Ind. 1991); *Louisiana Associated General Contractors, Inc. v. State Through Div. of Admin., Office of State Purchasing*,

669 So. 2d 1185 (La. 1996); *Whitaker v. City of Springfield*, 889 S.W.2d 869 (Mo. Ct. App. S.D. 1994); *Thomas v. Cooper River Park*, 322 S.C. 32, 471 S.E.2d 170 (1996); *Matter of Certification of Questions of Law from U.S. Court of Appeals for Eighth Circuit, Pursuant to Provisions of SDCL 15-24A-1, 1996 SD 10, 544 N.W.2d 183 (S.D. 1996)*.

Under Florida law, the remainder of an act may stand where part of the statute has been declared unconstitutional so long as (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and bad features are not so inseparable in substance that it can be said that the legislature would have passed one without the other, and (4) the act complete in itself remains after the invalid provisions are stricken. *Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020).

9 *State v. Melchert-Dinkel*, 844 N.W.2d 13, 96 A.L.R.6th 755 (Minn. 2014); *State v. Vaughn*, 366 S.W.3d 513 (Mo. 2012).

10 *Legends Bank v. State*, 361 S.W.3d 383 (Mo. 2012).

11 *California Tow Truck Ass'n v. City and County of San Francisco*, 807 F.3d 1008 (9th Cir. 2015) (applying California law); *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 258 Cal. Rptr. 161, 771 P.2d 1247 (1989).

12 *Vivid Entertainment, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (applying California law); *Jevne v. Superior Court*, 35 Cal. 4th 935, 28 Cal. Rptr. 3d 685, 111 P.3d 954 (2005).

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